TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1902.

No. 202.

JAMES TARRANCE, WILL SMITH, AMOS CLARK, ET AL.,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF FLORIDA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

FILED DECEMBER 4, 1902.

(16,333.)

(18,338.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 485.

JAMES TARRANCE, WILL SMITH, AMOS CLARK, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF FLORIDA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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1 Be it remembered that on the 17th day of May, A. D. 1901, at a regular term of the supreme court of the State of Florida, came the plaintiffs in error, James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt Green, by counsel, and filed in the clerk's office of the supreme court of Florida the transcript of the record of the proceedings and judgment of the circuit court of Florida for Escambia county, in a certain cause wherein The State of Florida was plaintiff and James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt Green were defendants, and on the writ of error therein from the judgment of the circuit court therein rendered, which said transcript of the record of the cause aforesaid, and subsequent proceedings to judgment and writ of error therefrom, is in the words and figures as follows, to wit:

2 Transcript of the record of proceedings in the circuit court of Escambia county, Florida, in the cause of The State of Florida, plaintiff, against James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell, and W. C. Green, alias Newt Green, defendants, therein lately pending.

On the third day of December, 1900, at the fall term of the said court, the regular venire of thirty jurors was returned.

On the third day of December, 1900, a grand jury of eighteen men were drawn from the regular venire of thirty jurors, of which said eighteen men one was excused by order of the court.

On the third day of December, 1900, the grand jury as drawn, was ordered by the court to retire and select from among their number a foreman and clerk. The grand jury then retired from the court-room, after which, on the same day, they returned into court and announced to the court that they had chosen a foreman and clerk from among their number, and announced the names of their foreman and clerk.

Whereupon, on the same day, the remaining seventeen jurors were duly sworn and empaneled as a grand jury for the term.

The court then ordered that the grand jury be duly sworn, which was done. The court then gave the charge to the grand jury, after which the grand jury retired to proceed with their work.

3 On the fifth day of December, 1900, the grand jury came into court and returned a true bill against James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, in the words and figures as follows, to wit:

In the name and by the authority of the State of Florida.

In the Circuit Court of the First Judicial Circuit of the State of Florida for Escambia County, at the Fall Term thereof, in the year of our Lord one thousand nine hundred, Escambia County, to wit:

The grand jurors of the State of Florida, enquiring in and for the body of the county of Escambia, upon their oaths do present that one James Tarrance, late of the county of Escambia aforesaid, in the circuit and State aforesaid, on the 18th day of May, in the year of our Lord one thousand nine hundred, with force and arms, in the county of Escambia aforesaid, then and there being, did then and there, without authority of law, of his malice aforethought and from a premeditated design to effect the death of one W. B. Moore, a human being, make an assault upon the said W. B. Moore, with a deadly weapon, to wit, a gun then and there charged and loaded with gunpowder and certain leaden balls, which said gun the said James Tarrance then and there had and held in his hands by then and there unlawfully of his malice aforethought and from a premeditated design to effect the death of the said W. B. Moore, shooting off and discharging the said gun charged and loaded as aforesaid, at, towards and
4 against the said W. B. Moore; then and there by means of shooting off the said gun charged and loaded as aforesaid at, towards and against the said W. B. Moore, unlawfully, of his malice aforethought and from a premeditated design to effect the death of the said W. B. Moore, striking and wounding the said W. B. Moore in and upon his neck, with one leaden ball then and there shot out of and discharged from said gun; then and there by means of striking and wounding the said W. B. Moore, in and upon the neck with the said leaden ball as aforesaid, unlawfully of his malice aforethought and from a premeditated design to effect the death of the said W. B. Moore, giving to and inflicting upon the said W. B. Moore, one mortal wound in and upon the neck of him the said W. B. Moore, of which said mortal wound then and there given and inflicted by the said James Tarrance, in the manner and by means aforesaid, and the said W. B. Moore then and there died; and the grand jurors aforesaid, further inquiring as aforesaid, do say that one Will Smith and one Amos Clark, and one Judson Moore and one Marshall Boyd and one Charles Robinson, and one Dave Powell, and one W. C. Green, alias Newt Green, were then and there personally present and unlawfully of their malice aforethought and from a premeditated design to effect the death of the said W. B. Moore, aiding, assisting, encouraging, and abetting the said James Tarrance, the said assault to commit and make upon the said W. B. Moore, in the manner and by the means aforesaid; and the grand jurors aforesaid do say that the said James Tarrance, the said Will Smith, the said Amos Clark, the said Judson Moore, the said Marshall Boyd, the said Charles Robinson, the said Dave Powell and

the said W. C. Green, alias Newt Green, then and there wil-
5 fully, without authority of law of their malice aforethought and from a premeditated design to effect the death of him the said W. B. Moore, did then and there kill and murder the said W. B. Moore, against the form of the statute in such cases made and provided, to the evil example of all others in like cases offending, and against the peace and dignity of the State of Florida.

2nd. And the grand jurors aforesaid, upon their oaths enquiring as aforesaid, do further present and say that, one James Tarrance, one Will Smith, one Amos Clark, one Judson Moore, one Marshall Boyd, one Charles Robinson, one Dave Powell and one W. C. Green, alias Newt Green, on the 18th day of May, A. D. 1900, in Escambia county, State of Florida, then and there being did then and there unlawfully of their malice aforethought and from a premeditated design to effect the death of one W. B. Moore, a human being, make an assault upon the said W. B. Moore, with certain deadly weapons, to wit, with certain shotguns, rifles and pistols, which said shotguns, rifles and pistols were then and there charged and loaded with gunpowder and leaden balls, the said James Tarrance, the said Will Smith, the said Amos Clark, the said Judson Moore, the said Marshall Boyd, the said Charles Robinson, the said Dave Powell, and the said W. C. Green, alias Newt Green, then and there having and holding the said shotguns, rifles and pistols in their hands; by then and there unlawfully of their malice aforethought and from a premeditated design to effect the death of the said W. B. Moore, shooting off and discharging the said shotguns, rifles and pistols
6 at and towards the said W. B. Moore, then and there by means of shooting off and discharging the said shotguns, rifles and pistols as aforesaid, then and there unlawfully, of their malice aforethought and from a premeditated design to effect the death of the said W. B. Moore, striking and wounding the said W. B. Moore in and upon his neck with one of the leaden balls as aforesaid, then and there by means of striking and wounding the said W. B. Moore in and upon the neck with the said leaden ball as aforesaid, then and there unlawfully of their malice aforethought and upon a premeditated design to effect the death of the said W. B. Moore, giving to and inflicting upon the said W. B. Moore, with the said leaden ball one mortal wound in and upon the neck of him the said W. B. Moore, of which said mortal wound then and there given and inflicted by the said James Tarrance, the said Will Smith, the said Amos Clark, the said Judson Moore, the said Marshall Boyd, the said Charles Robinson, the said Dave Powell, and the said W. C. Green, alias Newt Green, the said W. B. Moore, then and there died; and the grand jurors aforesaid enquiring as aforesaid do say that the said James Tarrance, the said Will Smith, the said Amos Clark, the said Judson Moore, the said Marshall Boyd, the said Charles Robinson, the said Dave Powell and the said W. C. Green, alias Newt Green, then and there wilfully, without authority of law, of their malice aforethought and from a premeditated design to effect the death of him, the said W. B. Moore, did then and there kill and murder the said W. B. Moore in the manner aforesaid,

against the form of the statute in such cases made and provided, to the evil example of all others in like cases offending, and
7 against the peace and dignity of the State of Florida.

J. WALTER KEHOE,
State's Attorney for the First Judicial Circuit of the State of Florida, Prosecuting for said State.

Which said indictment was endorsed on the back thereon in the words and figures following, to wit:

Circuit court, Escambia county. Fall term, A. D. 1900. Murder. State of Florida *vs.* James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green. Indictment. A true bill. (Signed) Joseph N. Andrews, foreman. Presented and filed in open court this 5th day of December, A. D. 1900. A. M. McMillan, clerk of circuit court, by B. H. Burton, D. clerk. J. Walter Kehoe, State attorney. State witnesses, J. C. Joiner, Daniel Proctor, Alice Davis, W. B. Proctor, Abraham Ruffin, George B. Gingles, J. Whiting Hargis, M. D. Filed December 5, 1900, A. M. McMillan, cl'k c't ct.

On December 5, 1900, the court ordered that capias issue for James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, against whom a true bill was returned by the grand jury for murder.

8 On December 6, 1900, the court ordered that James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, against whom a true bill was returned by the grand jury, for murder, be brought into court.

The said defendants were accordingly brought into court.

On December 6, 1900, the defendants, James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, by their attorneys, Purcell, Spears and Alston, filed a motion to quash the venire for grand and petit jurors, in the following words and figures, to wit:

In the Circuit Court of the First Judicial Circuit of Florida in and for Escambia County, Fall Term Thereof, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET AL. } Murder.

Motion to Quash, December 6, 1900.

And now comes the defendants, in their own proper persons and by their attorneys, Purcell, Alston & Spears, and before pleading to the indictment herein, and show unto the court:

1. That they are colored men of African descent, citizens and residents of the State of Florida, and of the United States of

America. That they are charged with the murder of W. B.
9 Moore, a white man.

2. That in the selection of names for jury duty by the county commissioners of Escambia county, Florida, in and for the present year, all colored men of African descent were discriminated against by the said county commissioners, on account of their race, color and previous condition of servitude, refused and failed to select the names of any colored men for jury duty, on account of their race, color and previous condition of servitude. That it has been the custom of the county commissioners in and for said Escambia county, in selecting names for jury duty, as required by law at their first meeting in January of each and every year, to discriminate against all colored men of African descent, and refuse to select the names of any, on account of their race, color and previous condition of servitude.

That there are in said Escambia county, Florida, as many colored citizens of African descent, of sound judgment, approved integrity, fair character and fully qualified for jury duty as white; there are more than fourteen hundred colored men in said county who are fully qualified for jury duty, of approved integrity, fair character and sound judgment, and a large number are tax-payers.

That the said county commissioners of Escambia county, whose duty it is made by law to select the names for jury duty in said Escambia county, Florida, for each and every year, are all white men, appointed by the governor of the State upon the recommendation of the white Democratic voters of said Escambia county.

That from the list so unlawfully selected by the county commissioners as aforesaid, on the 5th day of January, 1900, was
10 selected and drawn the present venire, from which said venire was drawn the grand jury that found the indictment against the defendants, as also the petit jury by whom these defendants are to be tried, and from which list all colored men of African descent were discriminated against by the county commissioners, and not one colored man was selected, simply on account of their race, color and previous condition of servitude.

Therefore these defendants move to quash the venire drawn for the present term of this honorable court, also the panels of grand and petit jurors, on the following good and sufficient reasons:

1. Because the law under which the venire for the present term was drawn is unconstitutional, in that it denies defendant an impartial jury, as granted by section II, declaration of rights, constitution of the State of Florida, and in that the said law is special and not general in its application, referring only to a certain class of persons known to the county commissioners as possessing certain qualifications, while others possessing the same qualifications, are excluded, and the law is therefore unconstitutional under section- 20–21, art. III, constitution of the State of Florida.

2. Because the county commissioners, in selecting the list of names for jury duty for and during the present year, discriminated against all colored men of African descent, on account of their race, color and previous condition of servitude, and from said list were

drawn the grand jury which found the indictment against the defendants and the petit jury which is to try them.

11 3. Because for many years all colored men of African descent have been discriminated against, and none have been selected or drawn or summoned as grand or petit jurors in this or in any of the courts of this county, although there are more than fourteen hundred colored men in said county, a large number of whom are tax-payers, of approved integrity, fair character, sound judgment and intelligence, and this discrimination is based entirely on race, color and previous condition of servitude.

4. By this discrimination against colored men as aforesaid these defendants are denied the equal protection of the law as provided and guaranteed by the 14th amendment to the Constitution of the United States.

Hence these defendants move to quash the venire and panels of grand and petit jurors as drawn for the present term of this honorable court.

PURCELL, SPEARS AND ALSTON,
Attorneys for Defendants.

Dec. 6, 1900.

On December 6, 1900, the defendants did file in the court their motion to quash the indictment against them, in the words and figures following, to wit:

In the Circuit Court. First Judicial Circuit of Florida, in and for Escambia County, Fall Term, 1900.

STATE OF FLORIDA
vs.
12 JAMES TARRANCE, WILL SMITH, JUDSON MOORE, Amos Clark, Marshall Boyd, Charles Robinson, Dave Powell, and W. C. Green, alias Newt Green. } Murder.

And now come the above-named defendants, and before pleading to the indictment herein, in their own proper person, and moves the court to quash the indictment herein on the following good and sufficient reasons, to wit:

1.

Because these defendants are citizens and residents of the State of Florida, and of the United States of America, that the county commissioners of said Escambia county, Florida, whose duty it is made by law to select names for jury duty for and during each year, did at their meeting held in January, A. D. 1900, select a list of jurors for jury duty for and during the present year, that said list selected contained five hundred names, to serve as grand and petit jurors, for and during the present year. That said county commissioners in selecting said list of names as aforesaid discriminated against all colored men of African descent, and refused to select any of them on account of their race, color and previous condition of servitude.

That at the time of the selection of said list by said county commissioners as aforesaid, there were more than fourteen hundred colored citizens and residents of said Escambia county, Florida, qualified for jury duty, and were so known to the county commissioners at that time.

2.

That from said list so unlawfully selected and drawn by the county commissioners, was selected or drawn the grand jury
13 for the present term of this honorable court, which found the indictment against these defendants.

(3.)

That for many years the said county commissioners have discriminated against all colored men of African descent, and although there were more than fourteen hundred colored men of African descent residents and citizens of said Escambia county, Florida, yet the said county commissioners failed and refused to select the names of any of them for jury duty, they, the said county commissioners, well knowing that there were, and are, many colored men possessing all the qualifications as required by law.

And the discrimination referred to was entirely due on account of race, color and previous condition of servitude. By this discrimination against colored men as aforesaid these defendants are denied equal protection of the law, as provided and guaranteed by the fourteenth amendment to the Constitution of the United States of America; therefore these defendants move the court to quash the indictment herein.

All of which these defendants are ready to verify.

(Signed) his JAMES x TARRANCE. mark.
his MARSHALL x BOYD. mark.
A. CLARK.
WILL SMITH.
DAVE POWELL.
his CHARLES x ROBINSON. mark.
JUDSON MOORE.
his W. C. x GREEN. mark.

STATE OF FLORIDA, }
County of Escambia, } ss:

On this day personally appeared James Tarrance, Will
14 Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, who being duly sworn, each for himself deposes and says, he is the defendant in the

above-entitled cause, that an indictment has been filed against him, charging him with the murder of one W. B. Moore, that he has read the contents of the above and foregoing motion, and that the matters and things therein set up are to their best knowledge, information and belief, true as therein and thereby set forth.

Sworn to and subscribed before me this 6th day of December, A. D. 1900.

[SEAL.] A. W. SPEARS,
Notary Public.

After both of which said motions were made and argued, the court reserved its decision, and announced that a decision on said motions would be rendered tomorrow morning at ten o'clock.

On December 6, 1900, after the proceedings above, the court ordered the prisoners, James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, be remanded to jail; whereupon the said prisoners were remanded to jail.

On the seventh day of December, 1900, the court denied the motion to quash the venire of grand and petit jurors, which said motion was made on December 6th and argued on that day.

15 On the seventh day of December, 1900, the court denied the motion to quash the indictment herein, which said motion was made on December 6, and argued on that day.

On the seventh day of December, 1900, the defendants, James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, were brought into court in the custody of the sheriff, and being also represented by counsel, it was ordered that they be arraigned, after which they all and each plead not guilty to the indictment.

Whereupon, on the same day, December 7, 1900, the court set the cause for trial on December 13, 1900, at 10 o'clock a. m.

It was ordered that the witnesses be discharged till 10 o'clock a. m., December 13, 1900.

It was ordered that the prisoners be remanded to jail, which was accordingly done.

On the seventh day of December, 1900, the State, by its attorney, made a motion for a special venire of seventy-five jurors, in the following words and figures, to wit:

In the Circuit Court of the First Judicial Circuit of Florida in and for Escambia County.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET AL.

16 The defendants being personally in court, now comes the State, by its attorney, and moves the court *that* a special venire of seventy-five good and lawful men, to serve as jurors

herein, and that said venire be made returnable to 10 o'clock a. m. Thursday, December 13, 1900.

J. WALTER KEHOE,
State Attorney.

December 7, 1900.

And on the same day, December 7, 1900, the said motion for a special venire of seventy-five jurors to serve in this case, was granted, to be summoned from the body of the county.

The court ordered that seventy-five jurors be summoned from the body of the county, in pursuance of the court's granting the said motion for a special venire of seventy-five good and lawful men.

The court ordered that the prisoners be remanded to jail until December 13, 1900, at ten o'clock a. m.

On December 13, 1900, at 10 o'clock a. m., the case of the State of Florida against James Tarrance and others was called.

The defendants being in court, the special venire of seventy-five jurors summoned for this cause, was called, and answered to their names.

Before proceeding with the special venire the regular venire were called, there being eight remaining jurors on the regular venire, who answered to their names as follows:

1. W. A. Shelby.
2. J. C. Hendrix.
3. Nick Smith.
4. Leonard Bailey.
5. John S. Thompson.
6. E. G. Graham.

17 7. James O'Leary.

8. William Garrett.

Counsel for the defendants did file their challenge to the array of eight remaining jurors on the regular venire, in the following words and figures, to wit:

In the Circuit Court, First Judicial Circuit of Florida, Escambia Co., Fall Term Thereof.

STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, MARSHALL BOYD, CHARLES ROBINSON, DAVE POWELL, W. C. GREEN, alias NEWT GREEN. } Murder.

And now comes the defendants in their own proper persons, and by their attorneys, Purcell, Spears and Alston, and challenge the array of jurors drawn to try these defendants, on the grounds that the sheriff in the selection of persons to serve on the jury to try these defendants, knowingly discriminated against all colored men of African descent and refused and failed to select any colored person to serve on said jury, well knowing there are more than five hundred colored men in said Escambia county fully qualified by

law to serve on jury, thus denying defendants, they being colored men, the equal protection of the law as guaranteed by 14th
18 amendment Constitution of the United States.

PURCELL, SPEARS & ALSTON,
Attorneys for Defendants.

And thereupon the court did duly consider the said challenge to the array of eight jurors, and denied same.

Whereupon the defendants did reserve their exception to the ruling of the court.

Whereupon the clerk did proceed to call the jurors, as follows:

1. W. A. Shelby was called as a juror, on regular venire. W. A. Shelby was tendered by the State and accepted by the defense.

2. J. C. Hendrix was called as a juror. J. C. Hendrix was tendered by the State and accepted by the defense.

3. Nick Smith was called as a juror. Juror stated that he had conscientious scruples against the infliction of capital punishment and does not favor the death penalty. Juror challenged for cause, and excused.

4. Leonard Bailey was called as a juror. Leonard Bailey stated that he had conscientious scruples against the infliction of capital punishment, and does not believe in hanging under any circumstances. Juror challenged for cause and excused.

5. John S. Thompson was called as a juror. Juror challenged by the defense, peremptorily, for the defendant James Tarrance. (1)

6. E. G. Graham was called as a juror. Juror challenged peremptorily by the defense, for the defendant James Tarrance (2).

7. James O'Leary was called as a juror. Juror challenged peremptorily by the defense, for the defendant James Tarrance (3).

19 8. William Garrett was called as a juror. Juror challenged by defense peremptorily, for the defendant James Tarrance (4).

The regular venire of jurors being exhausted, the special venire of seventy-five jurors was called.

Whereupon the defendants did file their challenge to the array of seventy-five jurors on the special venire, in the following words and figures, to wit:

In the Circuit Court, First Judicial Circuit of Florida, Escambia Co., Fall Term Thereof.

STATE OF FLORIDA *vs.* JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, MARSHALL BOYD, CHARLES ROBINSON, DAVE POWELL, W. C. GREEN, alias Newt Green.	Murder.

And now come the defendants, in their own proper persons and by their attorneys, Purcell, Spears & Alston, and challenge the array

of the special panel of jurors drawn to try these defendants, on the following grounds, that is to say: the sheriff of said Escambia county, in selecting the names of persons on said list discriminated against all colored men of African descent, on the account of their race, color and previous condition of servitude, and refused
20 and failed to select or summon any, although he well knew there were more than 500 colored men of African descent in said county fully qualified for jury duty and were well known to the sheriff; and by said discrimination by the sheriff as aforesaid these defendants are deprived of the equal protection of the law, as guaranteed under the 14th amendment of the Constitution of the United States.

PURCELL, SPEARS & ALSTON,
Att'ys for Def'ts.

Whereupon the court did consider the challenge to the array of seventy-five jurors drawn for this cause, and denied same.

Whereupon the defendants did reserve their exception to the ruling of the court.

Whereupon the clerk of our said court did proceed to call the jurors as follows:

1. C. J. Bell was called as a juror and duly sworn. Juror challenged peremptorily by the defendants, for the defendant James Tarrance (5).

2. Joseph Cummyns was called as a juror and duly sworn. Juror challenged peremptorily by the defense, for the defendant James Tarrance (6).

3. Donald McLellan was called as a juror and duly sworn. Juror states that, as a newspaper correspondent, his duty was to investigate the details of the killing of W. B. Moore by these defendants, and as such newspaper correspondent he has formed an opinion. Juror challenged for cause, and excused.

21 4. R. Eddins was called as a juror, and duly sworn by the clerk of said court. Juror challenged by the defense, peremptorily, for the defendant James Tarrance (7).

5. W. H. W. Jones was called as a juror, and duly sworn. Juror is peremptorily challenged by the defense, for the defendant James Tarrance (8).

6. R. E. Hendrix was called as a juror and duly sworn, on the *voire dire*. Juror tendered by the State and accepted by the defense.

7. J. T. Whitson was called as a juror, and duly sworn on the *voire dire*. Juror challenged by the defense peremptorily, for the defendant James Tarrance (9).

8. J. A. Addkinson was called as a juror, and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense for the defendant James Tarrance (10).

9. F. E. Brawner was called as a juror, and duly sworn on the *voire dire*. Juror is tendered by the State and accepted by the defense.

10. J. G. Shuttleworth is called as a juror, and duly sworn on the

voire dire. Juror tendered by the State and accepted by the defense.

11. Julius Menko was called as a juror, and duly sworn on the *voire dire.* Juror tendered by the State and peremptorily challenged by the defense, for the defendant Will Smith (1).

12. W. H. McCullagh is called as a juror, and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense
22 for the defendant Will Smith (2).

W. G. McNair was called as a juror, and duly sworn on the *voire dire.* Juror peremptorily challenged by the defense for the defendant Will Smith (3).

J. C. Walker was called as a juror, and duly sworn on the *voire dire.* Juror peremptorily challenged by the defense, for the defendant Will Smith (4).

R. H. Rosique was called as a juror. Juror was peremptorily challenged by the defense on behalf of the defendant Will Smith (5).

W. J. Castillo was called as a juror, and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Will Smith (6).

O. E. White was called as a juror, and duly sworn on the *voire dire.* Juror tendered by the State and accepted by the defendants.

J. D. Lewis was called as a juror, and duly sworn on the *voire dire.* Juror tendered by the State and peremptorily challenged by the defense for the defendant Will Smith (7).

19. L. S. Davenport was called as a juror, and duly sworn on the *voire dire.* Juror was tendered by the State and peremptorily challenged by the defense for the defendant Will Smith (8).

20. M. Mayo was called as a juror, and duly sworn on the *voire dire.* Juror is tendered by the State and peremptorily challenged by the defense for the defendant Will Smith (9).

23 21. J. E. McCann was called as a juror, and duly sworn on the *voire dire.* Juror peremptorily challenged by the defense for the defendant Will Smith (10).

22. M. D. Budd was called as a juror, and duly sworn on the *voire dire.* Juror peremptorily challenged by the defense for the defendant Amos Clark (1).

23. J. F. Godwin was called as a juror, and duly sworn on the *voire dire.* Juror was peremptorily challenged by the defense for the defendant Amos Clark (2).

24. E. McCurdy was called as a juror, and duly sworn on the *voire dire.* Juror was peremptorily challenged by the defense for the defendant Amos Clark (3).

25. Louis Friedman was called as a juror, and duly sworn on the *voire dire.* Juror stated that he had conscientious scruples against infliction of capital punishment. Juror challenged for cause and excused.

26. John Van Pelt was called as a juror, and was duly sworn on the *voire dire.* Juror stated that he had conscientious scruples against the infliction of capital punishment. Challenged for cause, and excused.

27. C. M. Joseph was called as a juror. Juror stated that he had

talked with a woman and a man about the case and formed an opinion, and thought the defendants guilty. Thinks that it would take a great deal of evidence to change that opinion. Juror is challenged for cause, and excused.

28. James Whitehead is called as a juror and duly sworn
24 on the *voire dire*. Juror is peremptorily challenged by the defense, for the defendant Amos Clark (4).

29. Travis Johnson is called as a juror, and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Amos Clark (5).

30. G. F. Stearns is called as a juror, and duly sworn on the *voire dire*. Juror is tendered by State and peremptorily challenged by the defense, for the defendant Amos Clark (6).

31. W. H. Metcalf is called as a juror, and duly sworn on the *voire dire*. Juror is challenged by the defense peremptorily for the defendant Amos Clark (7).

32. Joseph Pou is called as a juror, and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense, for the defendant Amos Clark (8).

33. Fred Humphreys is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Amos Clark (9).

34. Joseph Merlin is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Amos Clark (10).

35. Bleeker Forbes is called as a juror, and duly sworn on the *voire dire*. Juror is tendered by the State and accepted by the defense.

36. Joseph A. Bobe is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense
25 for the defendant Judson Moore (1).

37. W. L. Everhart is called as a juror, and duly sworn on the *voire dire*. Juror states that he is a Government official, being postmaster at Roberts, Florida, and is excused.

38. Robert Fillingim is called as a juror and duly sworn on the *voire dire*. Juror states that he has formed an opinion as to the guilt or innocence of the defendants, which cannot be removed by evidence. Juror is challenged for cause and excused.

39. W. D. Henderson is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Judson Moore (2).

40. H. Fillingim is called as a juror and duly sworn on the *voire dire*. Juror states that he has formed an opinion as to the guilt or innocence of the defendants. Would take evidence to remove it. Juror is challenged for cause by defense, and excused.

41. A. J. Fillingim is called as a juror, and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Judson Moore (3).

42. George Harper is called as a juror, and duly sworn on the *voire dire*. Juror states that he has a fixed opinion as to the guilt

or innocence of the defendants. Defense challenges juror for cause, and he is excused.

43. F. B. Langford is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Judson Moore.

44. Arthur Harper is called as a juror, and duly sworn on
26 the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Judson Moore (5).

45. James Bailey is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Judson Moore (6).

46. J. A. Godwin is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Judson Moore (7).

47. A. C. Tippin is called as a juror and duly sworn on the *voire dire*. Juror challenged peremptorily by the defense for the defendant Judson Moore (8).

48. Calvin Proctor is called as a juror and duly sworn on the *voire dire*. Juror is challenged by the defense peremptorily for the defendant Judson Moore (9).

49. W. D. Booth is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Judson Moore (10).

50. George Parazina is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Marshall Boyd.

51. Ed. Goldstucker was called as a juror. Juror states that he has formed a fixed opinion, which could not be removed by the evidence. Juror challenged for cause and excused.

52. P. D. Divine was called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Marshall Boyd (2).

27 53. William Cosgrove was called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for defendant Marshall Boyd (3).

54. Fred Schad was called as a juror and duly sworn on the *voire dire*. Juror is tendered by the State and accepted by the defense.

55. John Askerland is called as a juror and duly sworn on the *voire dire*. Challenged by the defense, peremptorily, for the defendant, Marshall Boyd (4).

56. Henry Perkins was called as a juror, and duly sworn on the *voire dire*. Juror is challenged by the defense for cause, because juror states that he was a member of the coroner's jury which sat upon the body of W. B. Moore, whom defendants are charged with having murdered. Juror is challenged for cause and excused.

57. J. M. Harrison is called as a juror, and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Marshall Boyd (5).

58. D. M. Carter is called as a juror and duly sworn on the *voire*

dire. Juror is peremptorily challenged by the defense for the defendant Marshall Boyd (6).

59. G. C. White was called as a juror and duly sworn on the *voire dire.* Juror states that he could not render a fair and impartial verdict. Juror is challenged for cause and excused.

60. W. A. Jones is called as a juror. Juror is peremptorily challenged by the defense for the defendant Marshall Boyd (7).

28 61. N. J. Brewton is called as a juror and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Marshall Boyd (8).

62. W. J. Kimmons is called as a juror and duly sworn on the *voire dire.* Juror is peremptorily challenged *for* the defense for the defendant Marshall Boyd (9).

63. J. Z. Bryars is called as a juror and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Marshall Boyd (10).

64. J. W. Crary is called as a juror and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Charles Robinson (1).

65. J. R. Lee is called as a juror, and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Charles Robinson (2).

66. R. G. Stanton is called as a juror and is duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Charles Robinson.

67. C. F. Bryant was called as a juror and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Charles Robinson (4).

68. R. V. Fillingim called as a juror and duly sworn on the *voire dire.* Peremptorily challenged by the defense for the defendant Charles Robinson (5).

69. A. T. Rice is called as a juror and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Charles Robinson (6).

29 70. E. Holland is called as a juror, and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Charles Robinson (7).

71. L. C. Brewton is called as a juror and duly sworn on the *voire dire.* Juror peremptorily challenged by the defense for the defendant Charles Robinson (8).

72. F. M. Reynolds is called as a juror and duly sworn on the *voire dire.* Juror peremptorily challenged by the defense for the defendant Charles Robinson (9).

73. J. P. Harrison is called as a juror and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Charles Robinson (10).

74. M. A. Register called as a juror and duly sworn on the *voire dire.* Juror is tendered by the State and accepted by the defense.

75. J. W. Hammack is called as a juror, and duly sworn on the *voire dire.* Juror is peremptorily challenged by the defense for the defendant Dave Powell.

The special venire of seventy-five jurors being exhausted, the court orders the sheriff to summon from bystanders eight jurors, whereupon the sheriff summons eight jurors as follows, to wit:

1. F. L. Hoffman.
2. E. Suter.
3. W. E. Perkins.
4. Charles Le Baron.
5. John G. Ramsey.
6. John Brosnaham.
7. Sam. Clifford.
8. G. F. Perkins.

Whereupon the defendants filed their challenge to the array of eight jurors in the following words and figures, to wit:

In the Circuit Court, First Judicial Circuit of Florida, Escambia County, Fall Term Thereof, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, MARSHALL BOYD, CHARLES ROBINSON, DAVE POWELL, and W. C. GREEN, alias Newt Green. } Murder.

Now come the defendants, by their attorneys, Purcell, Alston & Spears, also in their own proper persons, and challenge the array of special jurors summoned to try these defendants, because the sheriff of Escambia county, in selecting and summoning same knowingly discriminated against all colored men of African descent, failed and refused to select any colored men simply on account of their race, color and previous condition of servitude, the said sheriff well knowing there are more than five hundred colored men, residents and citizens of said county and State, fully qualified for jury duty, by reason whereof these defendants, being colored men of African descent, are denied the equal protection of the law,
31 as guaranteed by 14th amendment to Constitution of the United States.

PURCELL, ALSTON & SPEARS,
Def'ts' Att'ys.

Whereupon the court did consider the said challenge and denied the same.

Whereupon the defendants did reserve their exception to the ruling of the court.

Whereupon the clerk was ordered to proceed with the calling of the jury.

1. F. L. Hoffman was called as a juror and duly sworn on the *voire dire*. Juror was peremptorily challenged by the defense for the defendant Dave Powell (2).

2. E. Duter was called as a juror, and duly sworn on the *voire dire*. Juror stated that he had not been a resident of Florida for more than five months. Juror challenged for cause and excused.

3. W. E. Pickens was called as a juror and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense for the defendant Dave Powell (3).

4. Charles Le Baron was called as a juror, and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense, for the defendant Dave Powell (4).

5. John G. Ramsey was called as a juror and duly sworn on the *voire dire*. Juror tendered by the State and accepted by the defense.

6. John Brosnaham was called as a juror and duly sworn
32 on the *voire dire*. Juror peremptorily challenged by the defense for the defendant Dave Powell (5).

7. Sam. Clifford was called as a juror and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense, for the defendant Dave Powell (6).

8. G. F. Perkins was called as a juror and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense for the defendant Dave Powell (7).

The venire being exhausted, the court orders the sheriff to summon twelve good and lawful men to serve as jurors, from among the bystanders or from the street.

Whereupon the sheriff did bring into court twelve jurors, who answered to their names.

Whereupon the defendants did make their challenge to the
33 array of twelve special jurors, in the words and figures following, to wit:

In the Circuit Court, First Judicial Circuit of Florida, Escambia County, Fall Term Thereof, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, MARSHALL BOYD, CHARLES ROBINSON, DAVID POWELL, and W. C. GREEN, alias Newt Green. } Murder.

And now come the defendants herein, in their own proper person and by their attorneys, Purcell, Spears & Alston, and challenge the array of the twelve special jurors, summoned to try these defendants, on the following grounds:

Because the sheriff of Escambia county, in selecting and summoning said jurors, discriminated against all colored men, refused and failed to summon any colored men, on account of their color, race and previous condition of servitude. There are more than five hundred colored citizens and residents of said Escambia county fully qualified for jury duty, which fact was and is well known to the sheriff. On account of said discrimination against colored men of African descent by the sheriff, is a denial to the defendants of the equal protection of the law, these descendants being colored men of African descent, and does not give these defendants the

equal protection of the law, as guaranteed by the 14th amend-
34 ment to the Constitution of the United States.

PURCELL, SPEARS & ALSTON,
Def'ts' Att'ys.

Whereupon the court did consider the said challenge and denied the same.

Whereupon the defendants did reserve their exception to the ruling of the court.

Whereupon the clerk did proceed to call the jurors as follows:

1. J. G. Oliver was called as a juror and duly sworn on the *voire dire*. Juror stated that he had conscientious scruples against the infliction of capital punishment. Juror challenged for cause and excused.

2. Joseph Coleman is called as a juror and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense for the defendant Dave Powell (8).

3. J. A. Kirkpatrick was called as a juror and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense for the defendant Dave Powell (9).

4. B. Gerson was called as a juror and duly sworn on the *voire dire*. Juror states that he does not believe in capital punishment. Juror is challenged for cause and excused.

5. Samuel J. Isaacs is called as a juror and duly sworn on the *voire dire*. Juror is peremptorily challenged by the defense for the defendant Dave Powell (10).

6. Ed. W. Lawrence is called as a juror, and duly sworn on the *voire dire*. Juror states that he has formed an opinion as to the guilt or innocence of the defendants, that could not be easily removed. Juror excused.

35 7. Phillip Klien called as a juror and duly sworn on the *voire dire*. Juror states that he is not a citizen of the United States and State of Florida. Juror is challenged for cause and excused.

8. E. L. Davis is called as a juror. Juror peremptorily challenged by the defense for the defendant W. C. Green (1).

9. A. D. Weller was called as a juror and duly sworn on the *voire dire*. Juror asked to be excused, because of some private business, which was done with consent of counsel.

10. T. P. McCloskey was called as a juror and duly sworn on the *voire dire*. Juror peremptorily challenged by the defense for the defendant W. C. Green (2).

11. W. L. Johnson was called as a juror and duly sworn on the *voire dire*. Juror tendered by the State and accepted by the defense.

12. Stephen Kline was called as a juror and duly sworn on the *voire dire*. Juror stated that he was not a citizen of the United States. Juror challenged for cause and excused.

F. E. Brawner, previously tendered by the State and accepted by the defense, was peremptorily challenged by the State.

Bleeker Forbes, previously tendered as a juror by the State and

accepted by the defense, was excused by consent of counsel for State and defendants.

The court then adjourned till 10 o'clock a. m. December 14, 1900.

36 On December 14, 1900, at 10 o'clock a. m., the cause of the State of Florida *vs.* Tarrance, *et al.*, was again called.

A special venire of six jurors was called, and answered to their names.

Whereupon the defendants did file their challenge to the array, in the following words and figures, to wit:

In the Circuit Court, First Judicial Circuit of Florida, Escambia County, Fall Term Thereof, 1900.

STATE OF FLORIDA *vs.* JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON Moore, Marshall Boyd, Charles Robinson, Dave Powell, and W. C. Green, alias Newt Green.	Murder.

And now come the defendants, in their own proper persons and by their attorneys, Purcell, Spears and Alston, and challenge the array of the special panel of jurors drawn to try these defendants,

37 on the following grounds, that is to say, the sheriff of said Escambia county, in selecting the names of persons on said list discriminated against all colored men of African descent on the account of their race, color and previous condition of servitude, and refused and failed to select or summons any, although he well knew there were more than 500 colored men of African descent in said county fully qualified for jury duty, and were well known to the sheriff, and by said discrimination by the sheriff as aforesaid these defendants are deprived of the equal protection of the law, as guaranteed under the 14th amendment of the Constitution of the United States.

PURCELL, SPEARS & ALSTON,
Att'y- for Def't-.

Whereupon the court did consider the said challenge and denied the same.

Whereupon the defendants did reserve their exception to the ruling of the court.

And the clerk did then proceed to call the jurors as follows:

1. Ed. Ditmars was called as a juror and duly sworn on the *voire dire*. Juror stated that he had conscientious scruples against the infliction of capital punishment. Juror challenged for cause and excused.

2. M. L. Gonzalez was called as a juror and duly sworn on the *voire dire*. Juror stated that he had constientious scruples against the infliction of capital punishment. Juror challenged for cause and excused.

3. Archie Rosenstein was called as a juror and duly sworn on the

voire dire. Juror stated that he had conscientious scruples
38 against the infliction of capital punishment. Juror challenged for cause and excused.

4. R. M. Avery was called as a juror and duly sworn on the *voire dire.* Juror tendered by the State and accepted by the defense.

5. H. G. De Silva was called as a juror and duly sworn on the *voire dire.* Juror tendered by the State and accepted by the defense.

6. M. A. Touart was called as a juror and duly sworn on the *voire dire.* Juror tendered by the State and accepted by the defense.

The panel of twelve jurors, consisting of (1) W. A. Shelby, (2) J. C. Hendrix, (3) R. E. Hendrix, (4) J. G. Shuttleworth, (5) O. E. White, (6) Fred Schad, (7) M. A. Register, (8) J. G. Ramsey, (9) W. L. Johnson, (10) R. M. Avery, (11) H. G. De Silva, (12) M. A. Touart, were thereupon tendered by the State and accepted by the defense.

Whereupon the clerk did swear the jury to well and truly try the cause and return a verdict according to the evidence and the charge of the court.

Whereupon the witnesses in the cause were duly sworn, and the testimony proceeded.

39 After the hearing of which said evidence, on the same day, counsel did make their arguments to the jury.

After which, on the same day, the court did proceed to charge the jury, in the words and figures following, to wit:

The defendants, Jas. Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Chas. Robinson, Dave Powell and W. C. Green, alias Newt Green, are on trial before you charged with the crime of murder in the unlawful killing of one W. B. Moore, from a premeditated design to effect his death.

Under the laws of this State unlawful homicide is either murder in the 1st, 2nd or 3rd degree, or manslaughter, and under an indictment for murder in the first degree as in this case a defendant may be found guilty of any one of these offenses of which the evidence establishes his guilt beyond a reasonable doubt.

40 Murder in the first degree, here charged, is the unlawful killing of a human being from a premeditated design to effect his death. A premeditated design is an intention or purpose formed and entertained by one who is at the time cool, deliberate and so in the possession of his faculties that he has a full realization or consciousness of his purpose or intention and of the consequences of his acts. A design need not, in order to be premeditated, have existed for a great length of time or been well considered and pondered upon. If it exist for only a few minutes, but the person forming it is cool, deliberate and self-possessed, as just defined to you, with a full realization of the intention and of the consequences of his acts, it would be premeditated.

If the defendants unlawfully shot and killed Moore as charged, from a premeditated design at all *event* to effect his death, whether he was engaged in the commission of an unlawful act or not, they are guilty of murder in the first degree.

If they unlawfully shot and killed Moore, without a premeditated design to effect the death of any particular individual, by an act

imminently dangerous to another, and evincing depraved minds regardless of human life, they are guilty of murder in the
41 second degree.

If they unlawfully shot and killed Moore without any design to effect death, while they were engaged in the commission of a felony other than arson, rape, robbery or burglary, they are guilty of murder in the 3rd degree.

If they shot and killed Moore under such circumstances that the killing was not justifiable nor excusable homicide, nor murder in any degree, they are guilty of manslaughter.

If they unnecessarily killed Moore as charged while resisting an attempt on his part to commit an unlawful act, they are guilty of manslaughter. If Moore at the time he was shot was engaged by violence or threats in taking away from the scene of the shooting certain men whom he claimed were indebted to him, against their consent, this was an unlawful act on the part of Moore, and if the shooting was done by defendants in resisting such an act on his part and such shooting was not necessary in order to make such resistance effectual, they would be guilty of manslaughter. And under these circumstances the defendants would be guilty only of manslaughter even though they had previously determined to resist such unlawful act in this manner.

There are eight defendants on trial before you, and each
42 one is to be tried by you, and a verdict rendered as to him upon his own merits, according as the evidence shows or fails to show his guilt. It is not essential, however, in order that any defendant should be convicted, that the evidence should show that he personally fired a shot fatal to Moore. If one of the defendants unlawfully fired such shot and other defendant or defendants were present at the time, aiding, abetting and encouraging him in so doing, and sharing with him the unlawful intent of him who so fired, they would be equally guilty. And under these circumstances the guilt of each would be determined by the intent with which he personally so fired; if unlawfully, from a premeditated design to effect Moore's death without reference to whether Moore was acting unlawfully or not, of murder; if unnecessarily, in resisting an unlawful act of Moore's, of manslaughter.

The defendants, and each of them, are presumed innocent until they are proven guilty, and in order that they or any of them be found guilty, it devolves upon the State to prove his guilt by the evidence beyond a reasonable doubt. If you have such doubt as to their guilt they should be acquitted, and if convinced beyond a reasonable doubt of the guilt of them or any of them, but you
43 have a reasonable doubt of whether it is a higher or lower offence, he or they should be *g*ound guilty of the lower offence. In determining what the facts are you are the sole judges of the evidence and of the credibility of the witnesses. If there is a conflict in the testimony which you cannot reconcile, it is your province to say who is and who is not speaking the truth, and from what you find to be the facts in the case from a full consideration of the whole of the evidence, you will render your verdict.

A reasonable doubt is not a shadowy unsubstantial doubt amounting to a feeling that it is barely possible the defendants may be innocent, but such a doubt as prevents in your minds after a full consideration of the whole of the evidence, an abiding conviction to a moral certainty of the guilt of the defendant.

Should you find the defendants or any of them guilty, you will state in your verdict the degree or degrees of unlawful homicide of which you so find him or them, as that you find them or him guilty of murder in a certain degree, or manslaughter.

Should you find them or any of them guilty of murder in the first degree, a majority of your number may recommend him or them to mercy. This will have the effect of reducing the penalty for the offense to life imprisonment. Any verdict which you
44 may render as to their guilt or innocence must be concurred in by each of you; a recommendation to mercy may be made by a majority of your number.

(Signed) E. C. MAXWELL, *Judge.*

Dec. 14th, 1900.

Whereupon, on the same day, December 14th, 1900, after having heard the evidence and the charge of the court, the jury retired to consider their verdict.

Whereupon the court did adjourn till December 15th, 1900, at ten o'clock a. m., after having instructed the jury to bring in a sealed verdict should they reach one before 10 o'clock a. m. tomorrow.

On December 15, 1900, at 10 o'clock a. m., after having been out all night, the jury did come into court and render their verdict and upon their oaths say:

PENSACOLA, *Dec.* 15, 1900.

We, the jury, find the defendants guilty of murder in the third degree.

(Signed) H. G. DE SILVA, *Foreman.*

Upon the rendition of which said verdict the defendants,
45 by their attorneys, entered a motion in arrest of judgment and for a new trial, in the words and figures following to wit:

In the Circuit Court, Escambia County, Florida.

THE STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, MARSHALL BOYD, CHARLES ROBINSON, DAVE POWELL, and W. C. GREEN, alias Newt Green. } Murder.

Motion for New Trial.

And now come the defendants herein, and during the term hereof, by their attorneys, Purcell, Spears & Alston, and move the court

here to set aside the verdict herein and grant defendants a new trial on the following good and sufficient reasons.

1.

Because the court erred in striking defendants' motion to quash the venire and the panels of grand and petit jurors, for causes as set forth in and by their said motion.

2.

The court erred in striking defendants' motion to quash the indictment found and presented against these defendants, on
46 the grounds as set forth in and by their said motion.

3.

The court erred in refusing to grant defendants' challenges to the several special panels of petit jurors selected and summoned to try these defendants, on the grounds as set forth in and by their said challenges.

4.

The verdict herein is contrary to the evidence and the weight of the evidence.

5.

The verdict is contrary to the law and the charge of the court.

(Signed) PURCELL, SPEARS & ALSTON.

Dec. — 1900.

And on the same day the defendants, by their attorneys, filed their affidavits on their motion in arrest of judgment and for a new trial, in the following words and figures, to wit:

STATE OF FLORIDA,
Escambia County.

47 Before me personally appeared James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, who being by me first duly sworn say: They are defendants in the above and foregoing cause; that they were charged and tried for murder at the present term of this honorable court, and convicted of murder in the third degree. That since their trial and conviction as aforesaid they have been informed that one Abraham Ruffin, who was a State's witness, but not called, was present at Robinson's house at the time of the shooting said to have taken place, and in which it is said one W. B. Moore was murdered, that he is wagoner for Mr. Proctor, that he came to Robinson's house just a short time before the shooting, and was there when Alice Davis left the house, that he ate his meals there, that at the time Alice left there was no one in the house except Robinson, that he, Ruffin, immediately went into the kitchen for his dinner, leaving Robinson in front room; that while at din

ner he heard the shooting; immediately he arose and *going* our back of house; that at this time Robinson was on the bed lying down, he had no gun; a short time thereafter Clark came in and asked for a gun, and tried to get Robinson's shotgun, which he refused to give; that no one came to the house immediately
48 after said shooting, and for some time thereafter, as he remained there for quite a long time after the shooting; that none of the defendants were there or came there after said shooting; that Ruffin was here as a State's witness and stated the above facts to the State's solicitor.

Also that Mr. William Proctor is an important witness who also was summoned by the State, but do not know just what facts he will testify to:

And these defendants further say, they knew nothing of the facts of what state of facts these witnesses would testify to until Saturday the 22nd inst.

Sworn to and subscribed before *me* this 24th day of December, A. D. 1900.

his
JAMES x TARRANCE.
mark.
his
JUDSON x MOORE.
mark.
his
WILL x SMITH.
mark.
his
MARSHALL x BOYD.
mark.
his
A. C. x CLARK.
mark.
his
CHARLES x ROBINSON.
mark.
49 DAVID POWELL.
his
W. C. x GREEN.
mark.

Sworn to and subscribed before me this 24th day of Dec. 1900.

[SEAL OF COURT.]

A. M. McMILLAN,
Clerk Circuit Court,
By B. H. BURTON, *D. C.*

Which said motion, upon being argued by counsel, and upon being considered by the court, the court did make an order overruling said motion, to which said order defendants, by their attorneys, excepted.

On December 31, 1900, the defendants James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, were brought into court in the custody of the sheriff, and the court proceeded to

sentence the said James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, W. C. Green and Dave Powell. The *the* defendants, being asked if they had anything to say why the court should not pass sentence upon them, asked for the mercy of the court.

Thereupon the court did pass sentence upon the said de-
50 fendants as follows, to wit: It is therefore the judgment of the court and the sentence of the law that you, the said James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, be imprisoned at hard labor in the State prison for the term of fifteen years each, and that the sheriff of Escambia county take charge of them, the said James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, and them safely keep, convey and deliver, or cause to be kept conveyed and delivered to the keeper of the State prison, to be kept by him the said keeper of the State prison imprisoned at hard labor in the said prison for the term aforesaid of fifteen years each.

And afterwards, to wit, on the 15th day of January, after the adjournment of said term of court, by virtue of a special order to the effect that the defendants have sixty days in which to prepare their bill of exceptions, the defendants made up and tendered their bill of exceptions, which were settled and signed by the judge and ordered to be made a part of the record, which said bill of exceptions is in the words and figures following, to wit:

51 In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County, Fall Term, 1900.

STATE OF FLORIDA *vs.* JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON, Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green.	Murder.

I, E. C. Maxwell, judge of the circuit court of the first judicial circuit of the State of Florida, do hereby certify that during the progress of the cause pending in said court, wherein The State of Florida was plaintiff, and James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, were defendants, the following proceedings were had, viz:

On the 5th day of December, A. D. 1900, during the term of said court, after the filing of the indictment herein, the defendants filed the following motion, to wit:

52 *Motion in Full.*

In the Circuit Court, First Judicial Circuit of Florida, in and for Escambia County.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET AL. } Murder.

And now comes the defendants, in their own proper person and by their attorneys, Purcell, Spears, and Alston, and before pleading to the indictment herein, and shows unto the court here:

1.

That they are colored men of African descent, citizens and residents of the State of Florida, and of the United States of America. That they are charged with the murder of one W. B. Moore, a white man.

(2.)

That in the selection of names for jury duty, by the county commissioners of Escambia county, Florida, in and for the present year, all colored men of African descent were discriminated against by the said county commissioners, on account of their race, color, and previous condition of servitude, refused and failed to select
53 the names of any colored men for jury duty on account of their race, color and previous condition of servitude.

3.

That it has been the custom of the county commissioners in and for said Escambia county, Florida, in selecting names for jury duty as required by law at their first meeting in January of each and every year to discriminate against all colored men of African descent, and refuse to select the names of any on account of their race, color and previous condition of servitude.

4.

That all colored men of African descent have been discriminated against in the selection of names for jury duty for many years, on account of their race, color and previous condition of servitude. That the sheriff and other officers of said Escambia county, Florida, whose duty it is made by law, to summon jurors from bystanders, or the county at large, discriminate against all colored men of African descent, and refuse to summon any on account of their race, color and previous condition of servitude.

5.

That there are in said Escambia county, Florida, as many colored citizens of African descent of sound judgment, approved in-
54 tegrity, fair character, and fully qualified for jury duty, and are well known to be so qualified for jury duty by the said

county commissioners, as there are white men, there are more than one thousand four hundred colored men in said county, who are fully qualified for jury duty, of approved integrity, fair character, and sound judgment, and a large number of tax-payers.

6.

That the said county commissioners of Escambia county, whose duty it is made by law to select the names for jury duty in said Escambia county, Florida, for each and every year are all white men, appointed by the governor of the State of Florida, on the recommendation of the white Democratic voters of said Escambia county, Florida.

7.

That from the list so unlawfully selected by the said county commissioners as aforesaid, on the — day of January, A. D. 1900, were selected or drawn the present venire, from which said venire were drawn the grand jury that found the indictment against the defendants, as also the petit jury by whom these defendants are to be tried, and from which list all colored men of African descent were discriminated against by the said county commissioners know-n-ly and not one colored man was selected, simply on account, of their
55 race, color and previous condition of servitude.

Therefore these defendants move to quash the venire drawn for this present term of this honorable court, also the panels of grand and petit jurors, on the following good and sufficient reasons:

1.

Because the law under which the present venire for the present term was drawn is unconstitutional, in that, it denies defendants an impartial jury and trial, as guaranteed by sec. 11, declaration of rights, constitution of Florida, and in that the law is special and not general in its application, referring only to a certain class of persons, known to the county commissioners as possessing certain qualifications, while others possessing the same qualifications are excluded, and therefore the law is unconstitutional under secs. 20–21, art. III, constitution of Florida.

2.

Because the county commissioners in selecting the lists of names for jury duty for and during the present year, discriminated against all colored men of African descent, on account of their race, color and previous condition of servitude, and *for* said list were drawn the grand and petit jury which found the indictment against
56 these defendants, and the petit jury which is to try them.

3.

Because for many years, all colored men of African descent have been discriminated against and none have been selected or drawn or summoned as grand or petit jury in this or any of the courts of this county, although there are more than one thousand four hun-

dred colored men in said county, a large number of whom are taxpayers, and of approved integrity, fair character, sound judgment and intelligence, well known to the county commissioners to be such, and this discrimination is based entirely on race, color and previous condition of servitude.

4.

By this discrimination against colored men aforesaid these defendants are denied the equal protection of the law, as provided and guaranteed to them by the fourteenth amendment to the Constitution of the United States of America.

Therefore these defendants move to quash the venire, and the panels of the grand and petit jurors as drawn for the present term of this honorable court.

(Signed) I. L. PURCELL,
A. W. SPEARS, AND
C. H. ALSTON,
Attorneys for Defendants.

57 At the time of the filing of which motion the indictment had been returned by the grand jury and filed, and the only petit jury drawn and summoned was that for the first week of the term, during which week the said case was not for trial and was not tried.

And the State, by its attorney, Hon. J. Walter Kehoe, upon the 6th day of December, A. D. 1900, filed the following motion to strike the motion to quash the venire, to wit:

In Circuit Court, First Judicial Circuit, Escambia County, Florida.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET ALS. } Murder.

Now comes the State, by its attorney, and moves the court to strike the motion to quash the venire herein and for cause says:

1st. Said motion is impertinent.

2nd. Said motion submits nothing to the court for consideration or determination.

3rd. Because said motion is not such a motion as this court can consider in these proceedings.

4th. Because said motion sets up no state of facts which if
58 true would justify the quashing of the venire.

(Signed) J. WALTER KEHOE,
State Attorney.

Dec. 6th, 1900.

Said motions coming on to be heard, on the 6th day of December, A. D. 1900, during term time, the same being argued by the attorneys for the State and the defendant-,

Thereupon the court sustained the motion of the States to strike

the motion of the defendants to quash the venire, to which ruling the defendants then and there excepted.

On the 6th day of December, A. D. 1900, during term of said court the defendants made the following motion to quash the indictment herein.

In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County, Fall Term, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, JUDSON MOORE,
59 Amos Clark, Marshall Boyd, Charles Robinson,
Dave Powell, and W. C. Green, alias Newt Green. } Murder.

And now comes the above-named defendants, and before pleading to the indictment herein, in their own proper person, and moves the court to quash the indictment herein on the following good and sufficient reasons, to wit:

1.

Because these defendants are citizens and residents of the State of Florida, and of the United States of America; that the county commissioners of said Escambia county, Florida, whose duty it is made by law to select names for jury duty for and during each year, did at their meeting held in January, A. D. 1900, select a list of names for jury duty for and during the present year, that said list selected contained five hundred names, to serve as grand and petit jurors, for and during the present year. That said county commissioners in selecting said list of names as aforesaid, discriminated against all colored men of African descent, and refused to select any of them on account of their race, color and previous condition of servitude.

That at the time of the selection of said list by said county
60 commissioners as aforesaid, there were more than fourteen hundred colored citizens and residents of said Escambia county Florida, fully qualified for jury duty, and were so known to the county commissioners at that time.

2.

That from said list so unlawfully drawn and selected by the county commissioners, was selected or drawn the grand jury for the present term of this honorable court, which found the indictment against these defendants.

3.

That for many years the said county commissioners have discriminated against all colored men of African descent, and although there were more than fourteen hundred colored men of African descent residents and citizens of said Escambia county, Florida, yet the said county commissioners failed and refused to select the names of any of them for jury duty, they the said county commissioners well know-

ing that there were, and are many colored men possessing qualifications as required by law.

And the discrimination referred to was entirely due on account of race, color and previous condition of servitude. By this discrimination against colored men as aforesaid these defendants are de-
61 nied the equal protection of the law, as provided and guaranteed by the fourteenth amendment to the Constitution of the United States of America, therefore these defendants move the court to quash the indictment herein.

All of which these defendants are ready to verify.

(Signed) JAMES his x mark. TARRANCE.
AMOS CLARK.
DAVE POWELL.
JUDSON MOORE.
MARSHALL his x mark. BOYD.
WILL SMITH.
CHARLES ROBINSON.
W. C. his x mark. GREEN.

STATE OF FLORIDA, }
County of Escambia, } ss:

On this day personally appeared James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, who being duly sworn, each for himself deposes and says, he is the defendant in the above-entitled cause; that an indictment has been filed against him, charging him with the murder of one W. B. Moore, that he has read the contents of the above and foregoing motion, and that the matters and things set up are to their best knowledge, information and belief, true as
62 therein and thereby set forth.

Sworn to and subscribed before me this the 6th day of December A. D. 1900.

(Signed) A. W. SPEARS,
Notary Public.

Said motion coming on to be heard on the 6th day of December, A. D. 1900, during term time, the same being argued by attorneys for the State and the defendants, and upon consideration of said motion by the court, the same was overruled, to which ruling the defendants then and there excepted.

Thereupon the defendants were arraigned, and entered their plea of not guilty and the trial of the same being set for the 13th day of December, A. D. 1900, of the present term of said court, then and there an order was issued from the court directing the sheriff of said county to summons seventy-five special jurors from the body of the county to try said cause, returnable to the 13th day of December, A. D. 1900.

On the 13th day of December, A. D. 1900, during the term of said court, the special venire of seventy-five jurors summoned to try said cause being called, and before they were sworn and tried, the defendants by their attorneys offered the following challenge to the array, to wit:

63 In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County, Fall Term, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, MARSHALL BOYD, W. C. GREEN, CHARLES ROBINSON, and DAVE POWELL. } Murder.

And now come the defendants in their own proper persons and by their attorneys, Purcell, Spears and Alston, and challenge the array of jurors drawn to try these defendants, on the ground that the sheriff of Escambia county, Florida, in selection of persons to serve on the jury to try these defendants, knowingly discriminated against all colored men of African descent, and refused and failed to select any colored persons to serve on said jury, well knowing that there are more than five hundred colored men in said Escambia county, Florida, fully qualified to serve as jurors, thus denying these defendants, they being colored men, the equal protection of the law, as guaranteed by the 14th amendment to the Constitution of the United States.

64 (Signed) PURCELL, SPEARS, AND ALSTON,
Attorneys for Defendants.

Said motion coming on to be heard upon the 13th day of December A. D. 1900, during term time, the same being submitted without argument by attorneys for the State and the defendants, and upon consideration of the said motion by the court the same was overruled, to which ruling the defendants then and there excepted.

Thereupon the said special panel having been exhausted and the trial jury not having been completed, the court did then and there order a special venire of jurors, the sheriff having made service of same and the said jurors being in court, and before the swearing of said jurors, the defendants by their attorneys, did then and there make the following challenge to said panel of special venire, to wit:

In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County, Fall Term, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET AL. } Murder.

65 And now comes the defendants in their own proper person and by Purcell, Spears and Alston, their attorneys, and chal-

lenge the array of the special panel of jurors summons to try these defendants on the following grounds, to wit:

That is to say, because the sheriff of Escambia county, Florida, in selecting the names of persons to serve on the trial of this cause, of these defendants, discriminated against all colored men of African descent, on account of their race, color and previous condition of servitude, and knowingly refused and failed to select, or summon, any colored persons to so serve, although he well knows there are more than five hundred colored men of African descent in said county fully qualified for jury duty, and are well known to the sheriff, by said discrimination by the sheriff as aforesaid, these defendants are deprived of the equal protection of the law, as guaranteed by the 14th amendment of the Constitution of the United States.

(Signed) PURCELL, SPEARS AND ALSTON.

Said motion coming on to be heard upon the 13th day of December, A. D. 1900, in term time, the same being submitted by attorneys for the State and the defendants, and upon consideration of the same by the court the same was overruled, to which ruling the de-
66 fendants then and there excepted.

Thereupon the said special panel having been exhausted, and the trial jury not having been completed, the court then and there ordered a special venire of jurors, the sheriff having made service of the same and the said jury being now in court, and before swearing the said jury the defendants by their attorneys, did then and there make the following challenge to the said panel of special venire, to wit:

In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County, Fall Term, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET ALS. } Murder.

And now comes the defendants, by Purcell, Spears and Alston, their attorneys, also in their own proper person, and challenge the array of special jurors summoned to try these defendants,

Because the sheriff of Escambia county, Florida, in selecting and summoning persons for jury duty to try the said defendants, know-
ingly discriminated against all colored men of African de-
67 scent, on account of their race, color, and previous condition of servitude, and refused and failed to select any colored men, he the said sheriff well knowing that there are more than five hundred colored men, residents and citizens of said Escambia county, Florida, and of the United States, fully qualified for jury duty, by reasons whereof these defendants, being colored men of African descent, are denied the equal protection of the law, as guaranteed by the Constitution of the United states, the 14th amendment thereto:

(Signed) PURCELL, SPEARS AND ALSTON,
Attorneys for Defendants.

Said motion coming on to be heard upon the 13th day of December, *S.* D. 1900, during term time, and the same being submitted by the attorneys for the State and the defendants, and upon consideration of the same by the court, the same was overruled, to which ruling the defendants then and there excepted.

Thereupon the said special panel having been exhausted and the trial jury not having been completed, the court then and there ordered a special venire of jurors, the sheriff made the service
68 of the same, and the said jurors being then and there in court, and before being sworn, the defendants, by their attorneys, then and there made the following challenge to the said panel of special venire, to wit:

In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County, Fall Term, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET ALS. } Murder.

And now come the defendants, herein, in their own proper person*a* and by Purcell, Spears and Alston, their attorneys, and challenge the array of special jurors to try these defendants, upon the following grounds, to wit:

Because the sheriff of Escambia county, in selecting and summoning said jurors discriminated against all colored men of African descent, *and* refusing and failing to summons any colored men on account of their race, color and previous condition of servitude, there are more than five hundred colored citizens of Escambia county, Florida, fully qualified for jury duty, which fact was
69 well known to the sheriff and on account of said discrimination against colored men of African descent by the sheriff, is a denial to the defendants of the equal protection of the law, these defendants being all colored men of African descent.

(Signed) PURCELL, SPEARS & ALSTON,
Attorneys for Defendants.

Said motion coming on to be heard upon the 14th day of December, A. D. 1900, during the term of said court, the same being submitted by attorneys for the State and the defendant, and upon consideration of the same by the court, the same was overruled, to which ruling the defendants then and there excepted.

On the 14th day of December, A. D. 1900, during the term of said court, the defendants, having previously been arraigned and pleaded not guilty, the issue joined between the said parties came on to be tried before a jury, and thereupon the State produced and offered in evidence, the following — is hereto attached and made a part of this record.

The said parties having concluded and submitted their evidence the court thereupon gave the following instruction to the jury, to wit:

70 STATE
vs.
JAS. TARRANCE ET AL. } Charge of Court.

The defendants, Jas. Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, are on trial before you charged with the crime of murder in the unlawful killing of one W. B. Moore, from a premeditated design to effect his death.

Under the law of this State unlawful homicide is either murder in the 1st, 2nd, or 3rd degree, or manslaughter, and under an indictment for murder in the first degree, as in this case, a defendant may be found guilty of any one of these offences of which evidence establishes his guilt beyond a reasonable doubt.

Murder in the first degree here charged, is the unlawful killing of a human being from a premeditated design to effect his death. A premeditated design is an intention or purpose formed and entertained by one who is at the time cool, deliberate and so in the possession of all of his faculties, that he has a full realization or consciousness of his purpose or intention and of the consequences of his acts. A design need not, in order to be pre-
71 meditated, have existed for a great length of time, or been well considered and pondered upon, if it exist for only a few minutes but the person forming it is cool, deliberate and self-possessed as first defined to you, with a full realization of the intention and the consequences of his acts, it would be premeditated.

If the defendants unlawfully shot and killed Moore as charged from a premeditated design at all event- to effect his death, whether he was engaged in the commission of an unlawful act or not, they are guilty of murder in the first degree.

If they unlawfully shot and killed Moore without a premeditated design to effect the death of any particular individual, by an act imminently dangerous to another, and evincing depraved minds regardless of human life, they are guilty of murder in the second degree.

If they unlawfully shot and killed Moore without any design to effect death, while they were engaged in the commission of a felony other than arson, rape, robbery or burglary, they are guilty of murder in the third degree.

If they shot and killed Moore under such circumstances that the killing was not justifiable nor excusable homicide, nor murder in any degree, they are guilty of manslaughter.

72 If they unneccessarily killed Moore as charged, while resisting an attempt on his part to commit an unlawful act, they are guilty of manslaughter.

If Moore at the time he was shot was engaged by violence, or threats, in taking away from the scene of the shooting certain men whom he claimed were indebted to him, against their consent, this was an unlawful act on the part of Moore, and if the shooting was done by defendants in resisting such an act on his part, and such shooting was necessary in order to make such resistance effectual, they would by guilty of manslaughter.

And under these circumstances the defendants would be guilty only of manslaughter, even though they had previously determined to resist such unlawful act in this manner.

There are eight defendants on trial before you, and each one is to be tried by you and a verdict rendered as to him upon his own merits according as the evidence shows or fails to show his guilt. It is not essential, however, in order that any defendant should be convicted, that the evidence should show that he personally fired a shot fatal to Moore. If one of the defendants unlawfully fired such shot and the other defendants were present at the time, aiding, abetting, and encouraging him in so doing, and showing
73 with him the unlawful intent of him who so fired, they would be equally guilty, and under these circumstances the guilt of each one would be determined by the intent *which* which he personally so acted; if unlawfully from a premeditated design to effect Moore's death, without reference to whether Moore was acting unlawfully or not, of murder; if unnecessarily in resisting an unlawful act of Moore's, of manslaughter.

The defendants and each of them are presumed innocent until they are proven guilty, and in order that they or any of them be found guilty it devolves upon the State to prove his guilt by the evidence beyond a reasonable doubt. If you have such doubt as to their guilt they should be acquitted, and if convinced beyond a reasonable doubt of the guilt of them, or any of them, but you have a reasonable doubt of whether it is of a higher or lower offence, he or they should be found guilty of the lower offense.

In determining what the facts are you are the sole judges of the evidence and of the credibility of the witnesses. If there is a conflict in the testimony which you cannot reconcile, it is your province to say who is and who is not speaking the truth, and from what you find to be the facts in the case from a full consideration of the whole of the evidence you will render your verdict.

74 A reasonable doubt is not a shadowy, unsubstantial doubt amounting to a feeling that it is barely possible the defendant may be innocent, but such a doubt as prevents in your minds after a full consideration of the whole of the evidence, an abiding conviction to a moral certainty of the guilt of the defendants.

Should you find the defendants, or any of them guilty, you will state in your verdict the degree or degrees of unlawful homicide of which you so, find him or them, as that you find them or him guilty of murder in a certain degree, or of manslaughter.

Should you find them or any of them guilty of murder in the first degree, a majority of your number may recommend him or them to mercy of the court. This will have the effect of reducing the penalty for the offense to life imprisonment. Any verdict which you may render as to their guilt or innocence must be concurred in by each of you; a recommendation to mercy may be made by a majority of your number.

E. C. MAXWELL, *Judge.*

December 14th, A. D. 1900.

On the 14th day of December, A. D. 1900, at a term of said court came the respective parties by their attorneys and submitted said cause, on the issues joined between them to a jury, who
75 were duly sworn according to law, and who having heard the evidence, the charge of the court and argument of counsel, returned the following verdict:

PENSACOLA, *Dec. 15th*, 1900.

We, the jury, find the defendants guilty of murder in the third degree.

(Signed) H. C. DE SILVER, *Foreman.*

The said cause having been submitted to the jury by the court under its charge, and the jury having rendered a verdict against the said defendants, the defendants on the 15th day of December, A. D. 1900, at the term of said court, made and submitted the following motion for a new trial.

In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County, Fall Term Thereof, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET ALS. } Murder.

And now come the defendants herein, during the term hereof, by their attorneys, Purcell, Spears and Alston, and moves the
76 court here to set aside the verdict herein and grant defendants a new trial on the following grounds, to wit:

Because the court erred in striking defendants' motion to quash the venire, and the panels of grand and petit jurors, for cause as set forth in and by their said motion.

2.

Because the court erred in striking defendants' motion to quash the indictment found and presented against them, on the grounds as set forth in and by their said motion.

3.

The court erred in refusing to grand defendants' challenge to the several special panels of petit jurors selected and summoned to try these defendants, on the grounds as set forth in and by their said challenges.

4.

Because the verdict is contrary to the law and the charge of the court.

(Signed) PURCELL, SPEARS AND ALSTON,
Attorneys for Defendants.

Dec. 18th, 1900.

Said motion coming on to be heard on the 24th day of
77 December, A. D. 1900, during term time, the same being argued by the attorneys for State and the defendants, and upon consideration of said motion by the court the same was overruled, to which ruling the defendants then and there excepted.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET ALS. } Murder.

And now come the said defendants, by Purcell, Spears and Alston, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in striking defendants' motion to quash the venire and panels of grand and petit jurors drawn and summoned for this term of our said court, on the grounds as set forth in and by their said motion, to wit, the discrimination against colored men, commonly called negroes, on account of their race, color and previous condition. See motion, page — of record.

Second. The refusal of the court to grant defendants' motion to quash the indictment found against them, on the grounds as set out in and by their said motion, to wit: Because all colored men
78 of the negro race had been discriminated against in selecting the names of persons to serve on the grand jury that found said indictment, on account of their race, color and previous condition of servitude. See motion, page —.

Third. The refusal of the court to grant defendants' several challenges to the several arrays of the several special venire of petit jurors selected and summoned by the sheriff to try these defendants, on the grounds as set forth in and by their said several challenges, on the grounds as set out by said challenges, to wit, on the grounds of discrimination against colored men in the selection and summoning of said jurors. See challenges, page — of record.

Fourth. The refusal of the court to grant defendants new trial on grounds as set up in and by their said motion. See motion, page — of record.

Therefore these defendants pray that the judgment aforesaid may be reversed and a new trial granted.

And inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record the said defendants did, on the 14th day of January, 1901, after the expiration of said term, by virtue of a special order herein,
79 made, propose this bill of exceptions to the said judge and requested him to sign same, which is done this 7th day of February, A. D. 1901.

E. C. MAXWELL,
Judge Circuit Court, First Judicial Circuit of Florida.

On the 2nd day of January, 1901, the defendants did file in this court their insolvent affidavit in the words and figures following, to wit:

In the Circuit Court, First Judicial Circuit, Escambia County, Florida, Fall Term Thereof, 1900.

STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, CHARLES ROBINSON, DAVE POWELL, MARSHALL BOYD, W. C. GREEN, alias Newt Green. } Murder.

STATE OF FLORIDA, *Escambia County,* } *ss:*

Before the subscriber personally appeared James Tarrance,
80 Amos Clark, Judson Moore, Will Smith, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, who being by me first duly sworn on oath do say:

They are the defendants named in the above and foregoing cause; that they were tried at the December term, 1900, of this honorable court on the charge of murder, were convicted of murder in the third degree, that they have appealed from said conviction to the supreme court of the State of Florida; that they are utterly unable to pay the costs, either in whole or in part, that they have neither property nor other means of payment of same, either in their possession or under their control, and have not divested themselves of their property for the purpose of receiving benefits from their oath; and are also unable to enter into a bond to secure the payment of same.

1. A. C. CLARK.
2. JAMES x (his mark) TARRANCE.
3. WILLIE SMITH.
4. JUDSON MOORE.
5. CHARLES ROBINSON.
6. DAVID POWELL.
7. MARSHALL x (his mark) BOYD.
8. W. C. x (his mark) GREEN.

Sworn to and subscribed before me this 2nd day of Janu-
81 ary, A. D. 1901.

A. W. SPEARS,
Notary Public.

In *in* connection with said affidavit of defendants, they also filed the following affidavit:

STATE OF FLORIDA, *Escambia County,* } ss:

On this day personally appeared before me, W. M. Williams and W. H. Campbell, who being by me first duly sworn says: I know the defendants James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green; have known each and all of them for some considerable time, and do know that they, neither of them possesses any property either real or personal; that their personal property consists simply in such clothes as they now have with them in the county jail, and in all not worth more than five or six dollars, each; that they have not disposed of their property; that they are poor men working on turpentine farms, that affiants have resided in the city of Pensacola, Florida, for a number of years, and well know the defendants. That said affiants have no interest in the prosecution of these defendants, either directly or indirectly, and are not related to them or either of them by blood or marriage.

82 (Signed) W. M. WILLIAMS.
(Signed) W. H. CAMPBELL.

Sworn to and subscribed before me this 2nd day of Jan. A. D. 1901.

(Signed) I. L. PURCELL,
[NOTARIAL SEAL.] *Notary Public.*

Whereupon the judge of our said court did issue the following order:

In Circuit Court, First Judicial Circuit of Florida, Escambia County.

STATE OF FLORIDA
vs.
JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, Marshall Boyd, Charles Robinson, Dave Powell, and W. C. Green, alias Newt Green.

And now on this day this cause coming on to be heard on affidavit of defendants, the court being fully advised by affidavits filed herein, that the defendants herein are utterly unable to pay costs or give bond as required by law for said costs, that a writ or error is prayed for herein, it is hereby ordered and decreed that said writ of error issued shall operate as a supercedeas, and the costs herein *he* taxed to the State.

83 Done this 3rd day of January, A. D. 1901.
(Signed) E. C. MAXWELL, *Judge.*

On the 4th day of January, 1901, the defendants filed their assignment of errors, in the following words and figures, to wit:

In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET AL. } Murder.

And now come the said defendants, by Purcell, Spears & Alston, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in striking defendants' motion to quash the venire and panels of grand and petit jurors drawn and summoned for this term of our said court, on the grounds as set forth in and by their said motion, to wit: "The discrimination against colored men, commonly called negroes, on account of their race, color and previous condition of servitude. See motion, page — of record.

Second. The refusal of the court to grant defendants' motion to quash the indictment found and filed against defendants, on the grounds as set out in and by their said motion, to wit: Because all colored men of the negro race have been discriminated against in selecting names of persons to serve on the grand jury that
84 found and presented said indictment against these defendants, on account of their race, color and previous condition of servitude. See motion, page — of record.

Third. The refusal of the court to grant defendants' several challenges to the several array of special venire of petit jurors selected and summoned by the sheriff to try these defendants, on the grounds as set forth in and by their said several challenges, on the grounds as set out by said challenges, to wit, on the ground of discrimination against colored men in the selection and summoning of said jurors, on account of their race and color. See challenges, pages — of record.

Fourth. The refusal of the court to grant defendants new trial on grounds as set up in and by their said motion. See motion page — of record.

Thereupon these defendants pray that the verdict and judgment herein may be reversed and a new trial granted defendants.

(Signed) PURCELL, SPEARS & ALSTON,
Def'ts' Att'ys.

I, A. M. McMillan, clerk of the circuit court of the State of Florida, first judicial circuit in and for the county of Escambia, do hereby certify that the foregoing pages, numbered from 1 to 231 inclusive, constitute a true copy of all of the proceedings and a correct transcript of the record of the judgment in the case of
85 The State of Florida, plaintiff, and James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt Green, defendants, as appears upon the files and records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this the 15th day of May, in the year of our Lord one thousand nine hundred and one.

[SEAL.] A. M. McMILLAN,
Clerk of the Circuit Court for the County of Escambia,
By B. H. BURTON, *D. C.*

86 And afterwards, to wit: on the 14th day of June, 1901, came the plaintiffs in error and filed herein their assignment of errors, which said assignment of errors is in the words and figures as follows, to wit:

In Circuit Court, First Judicial Circuit of Florida, in and for Escambia County.

STATE OF FLORIDA
vs.
JAMES TARRANCE ET AL. } Murder.

And now come the said defendants, by Purcell, Spears & Alston, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in striking defendants' motion to quash the venire and panels of grand and petit jurors drawn and summoned for this term of our said court, on the grounds as set forth in and by their said motion, to wit, the discrimination against colored men, commonly called negroes, on account of their race, color and previous condition of servitude. See motion, page 199 of record.

Second. The refusal of the court to grant defendants' motion to quash the indictment found and filed against defendants, on the grounds as set out in and by their said motion, to wit, because
87 all colored men of the negro race have been discriminated against in selecting names of persons to serve on the grand jury that found and presented said indictment against these defendants, on account of their race, color and previous condition of servitude. See motion, page- 206 & 204 of record.

Third. The refusal of the court to grant defendants' several challenges to the several array of special venire of petit jurors selected and summoned by the sheriff to try these defendants, on the grounds as set forth in and by their said several challenges, on the grounds as set out by said challenges, to wit: on the ground of discrimination against colored men in the selection and summoning of said jurors, on account of their race and color. See challenges, pages 210–215 of record.

Fourth. The refusal of the court to grant defendants a new trial on grounds as set up in and by their motion. See motion, page 192 of record.

Thereupon these defendants pray that the verdict and judgment herein may be reversed and a new trial granted defendants.

(Signed) PURCELL, SPEARS & ALSTON,
Def'ts' Att'ys.

88 And afterwards, to wit: on the 9th day of July, 1901, came the parties, both plaintiffs in error and defendant in error in said cause, by their counsel and submitted their cause to said supreme court upon the said transcript of the record and oral argument.

And at a subsequent day, to wit: on the 23rd day of July, A. D. 1901, judgment was rendered by said supreme court of the State of Florida, in words and figures as follows, to wit:

JAMES TARRANCE, WILL SMITH, AMOS Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd, and W. C. Green, alias Newt. Green, Plaintiffs in Error, vs. THE STATE OF FLORIDA, Defendant in Error.	Upon Writ of Error to a Judgment of the Circuit Court within and for the County of Escambia.

This cause having been submitted to the court at a previous day of this term upon a transcript of the record of the judgment aforesaid and the argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the court that the said judgment of the circuit court be and is hereby affirmed; and it appearing to the court that the plaintiffs in error are insolvent, it is ordered that the costs herein be taxed against the county of Escambia, which costs amount to the sum of —, all of which is ordered to be served to the court below.

89

The opinion of the court in this cause was this day read by Mr. Justice Carter, and ordered to be filed.

R. F. TAYLOR,
Chief Justice Supreme Court of Florida.

90 And afterwards, to wit: on the 1st day of August, A. D. 1901, came the plaintiffs in error, by counsel, and filed in open court before the chief justice their petition for the allowance of writ of error to said judgment, returnable before the Supreme Court of the United States thirty days from the issuance of the citation herein, which petition was in the words and figures as follows, to wit:

In the Supreme Court of the State of Florida, June Term Thereof, 1901.

JAMES TARRANCE, WILL SMITH, AMOS CLARK, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell, and W. C. Green, alias Newt Green, Plaintiffs in Error,
vs.
THE STATE OF FLORIDA, Defendant in Error.

Murder.
Escambia County.

And now come the plaintiffs, James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave Powell and W. C. Green, alias Newt Green, and say that on or about the 23rd of July, A. D. 1901, this honorable court rendered the judgment herein in favor of defendant and against these plaintiffs, denying to them the rights and guaranties claimed by them
91 under the 14th amendment of the Constitution of the United States, section 1, which guarantees to every citizen a fair and impartial trial and the equal protection of the law which was denied plaintiffs in the court below and affirmed in this honorable court, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of plaintiffs, all of which will more fully appear from the record and assignment of errors filed in said cause. Wherefore these plaintiffs pray a writ of error may issue in this behalf to the October term, 1901, of the United States Supreme Court, for the correction of errors so complained of, and that a transcript of the record, proceedings, judgment and decision in this cause, duly authenticated, may be sent to our said supreme court.

PURCELL, ALSTON & SPEARS,
Attorneys for Plaintiffs in Error.

92 Whereupon, on the 8th day of August, A. D. 1901, prayer of the petitioners was granted by an order, in words and figures as follows, to wit:

In the Supreme Court of the State of Florida.

JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, Charles Robinson, Dave Powell, Marshall Boyd, and W. C. Green, alias Newt. Green, Plaintiffs in Error,
vs.
THE STATE OF FLORIDA, Defendant in Error.

And now comes the plaintiffs in error, by their counsel, and file their petition praying for a writ of error to be allowed by this court to the final judgment rendered on the 23rd day of July, A. D. 1901, returnable thirty days from the issuance of citation herein to the Supreme Court of the United States.

Whereupon it is considered and ordered by the court that the

prayer of petitioners is granted and the writ of error is allowed. This August 8th, 1901.

R. F. TAYLOR,
Chief Justice Supreme Court of Florida.

93 And thereafter, upon the same day upon presentation to the chief justice of said petition for the allowance of the writ of error, the same was allowed by the chief justice as appears upon the original writ of error as accompanying this return; and upon the same day a citation was allowed by the chief justice, as appears upon the original citation accompanying this return to the writ of error aforesaid.

94 UNITED STATES OF AMERICA, } *ss:*
State of Florida, }

I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing pages, numbered from one (1) to ninety-three (93) inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt. Green, plaintiffs in error, *vs.* The State of Florida, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed, at the city of Tallahassee, the capital of said State, this 30th day of September, A. D. 1901.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

95 The foregoing transcript of record of the proceedings of the supreme court of the State of Florida in the case of James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt Green, *versus* The State of Florida is transmitted to the Supreme Court of the United States in obedience to a writ of error issued, herein, the original of which is hereto attached.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

96 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Florida, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Florida before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit between James Tarrance, Will Smith, Amos

Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt. Green, and the State of Florida, wherein was drawn in question the validity of a statute of and an authority exercised under said State of Florida on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt. Green, as by their complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventh day of September, A. D. nineteen hundred and one (A. D. 1901), in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of August, in the year of our Lord one thousand nine hundred and one (A. D. 1901), and the clerk of the circuit court of the United States for the fifth judicial circuit, northern district of Florida.

Seal U. S. Circuit Court, Northern Dist. of Florida.

F. W. MARSH,
Clerk of the United States Circuit Court for the Fifth Judicial Circuit and the Northern District of Florida,
By W. C. HODGES,
Deputy Clerk.

Writ of error allowed August 8th, A. D. 1901.
R. F. TAYLOR,
Chief Justice Supreme Court of Florida.

[Endorsed:] Filed Aug. 8 1901 B. B. Wilson, clerk supreme court.

97 JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON Moore, Charles Robinson, Dave Powell, Marshall Boyd, and W. C. Green, alias Newt. Green, Plaintiffs in Error,
vs.
THE STATE OF FLORIDA, Defendant in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the State of Florida, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 7th day of September, A. D. nineteen hundred and one, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Florida, wherein James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt. Green are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the final judgment therein rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. F. Taylor, chief justice of the supreme court of the State of Florida, this 8th day of August, in the year of our Lord nineteen hundred and one (A. D. 1901).

[Seal Supreme Court of the State of Florida.]

R. F. TAYLOR,
Chief Justice of the Supreme Court of Florida.

By the chief justice,
Attest:
B. B. WILSON,
Clerk Supreme Court, State of Florida.

In behalf of the State of Florida, I hereby acknowledge service of this citation, this 8th day of August, 1901.

W. B. LAMAR,
Attorney General of the State of Florida.

[Endorsed:] Filed Aug. 8 1901 B. B. Wilson, clerk supreme court.

98 In the Supreme Court of Florida, June Term, A. D. 1901.

JAMES TARRANCE ET AL., Plaintiffs in Error,
vs.
THE STATE OF FLORIDA, Defendant in Error.

Upon application of counsel for plaintiffs in error, and good cause being shown therefor, it is ordered that the time for filing with the clerk of the Supreme Court of the United States the transcript of record and accompanying papers upon writ of error issued herein on the 8th day of August, A. D. 1901, be enlarged and extended until the 17th day of October, 1901.

Done and ordered at Tallahassee, Florida, this 5th day of September, A. D. 1901.

R. F. TAYLOR,
Chief Justice Supreme Court of Florida.

99 In the Supreme Court of Florida, June Term, A. D. 1901.

JAMES TARRANCE, WILL SMITH, AMOS CLARK, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd, and W. C. Green, alias Newt. Green, Plaintiffs in Error,
vs.
THE STATE OF FLORIDA, Defendant in Error. } Escambia County.

CARTER, *J.:*

At the fall term, 1900, of the circuit court of Escambia county, beginning on Monday, December 3rd, plaintiffs in error were indicted for the murder of one W. B. Moore. The indictment, presented and filed December 5th, charged them with murder in the first degree, but upon a trial had at the same term they were found guilty of murder in the third degree, and from the sentences imposed sued out this writ of error.

In the oral argument of counsel for plaintiffs in error every question presented by the record and assignment of error was expressly abandoned except the specific rulings considered in this
100 opinion. Under the practice prevailing in this court all questions not argued, or which are expressly abandoned, we are not required to consider.

After the indictment was presented and filed, but before pleading thereto, on December 5th, defendants filed the following motion in the cause: And now come the defendants, in their own proper person and by their attorneys, Purcell, Spears and Alston, and before pleading to the indictment herein, and shows unto the court here:

(1.)

That they are colored men of African descent, citizens and residents of the State of Florida, and of the United States of America. That they are charged of the murder of one W. B. Moore, a white man.

(2.)

That in the selection of names for jury duty, by the county commissioners of Escambia county, Florida, in and for the present year, all colored men of African descent were discriminated against by the said county commissioners on account of their race, color, and previous condition of servitude, refused and failed to select the names of any colored men for jury duty on account of their race, color and previous condition of servitude.

(3.)

That it has been the custom of the county commissioners in and for said Escambia county, Florida, in selecting names for jury

duty as required by law at their first meeting in January of
101 each and every year to discriminate against all colored men of African descent, and refuse to select the names of any on account of their race, color and previous condition of servitude.

(4.)

That all colored men of African descent have been discriminated against in the selection of names for jury duty for many years, on account of their race, color and previous condition of servitude. That the sheriff and other officers of said Escambia county, Florida, whose duty it is made by law, to summon jurors from bystanders, or the county at large, discriminate against all colored men of African descent and refuse to summon any on account of their race, color and previous condition of servitude.

(5.)

That there are in said Escambia county, Florida, as many colored citizens of African descent of sound judgment, approved integrity, fair character, and fully qualified for jury duty, and are well known to be so qualified for jury duty by the said county commissioners, as there are white men; there are more than one thousand four hundred colored men in said county, who are fully qualified for jury duty, of approved integrity, fair character, and sound judgment, and a large number of tax-payers.

(6.)

That the said county commissioners of Escambia county, whose duty it is made by law to select the names for jury duty in said Escambia county, Florida, for each and every year, are all white men, appointed by the governor of the State of Florida, on the
102 recommendation of the white Democratic voters of said Escambia county, Florida.

(7.)

That from the list so unlawfully selected by the said county commissioners as aforesaid, on the — day of January, A. D. 1900, were selected or drawn the present venire, from which said venire were drawn the grand jury that found the indictment against the defendants, as also the petit jury by whom these defendants are to be tried, and from which list all colored men of African descent were discriminated against by the said county commissioners knowingly, and not one colored man was selected, simply on account of their race, color and previous condition of servitude. Therefore these defendants move to quash the venire drawn for this present term of this honorable court, also the panels of grand and petit jurors, on the following good and sufficient reasons: (1) Because the law under which the present venire for the present term was drawn is unconstitutional, in that, it denies defendants an impartial jury and trial, as guaranteed by sec. 11, declaration of rights, constitution of Florida, and in that the law is special and not general in its application, referring only to a certain class of persons,

known to the county commissioners as possessing certain qualifications, while others possessing the same qualifications are excluded and therefore the law is unconstitutional under secs. 20 and 21, art. III, constitution of Florida. (2) Because the county commissioners in selecting the lists of names for jury duty for and during the present year, discriminated against all colored men of African descent, on account of their race, color and previous condition of servitude, and from said list were drawn the
103 grand and petit jury which found the indictment against these defendants, and the petit jury which is to try them. (3) Because for many years all colored men of African descent have been discriminated against and none have been selected or drawn or summoned as grand or petit jury in this or any of the courts of this county, although there are more than one thousand four hundred colored men in said county, a large number of whom are taxpayers, and of approved integrity, fair character, sound judgment and intelligence, well known to the county commissioners to be such, and this discrimination is based entirely on race, color and previous condition of servitude (4) By this discrimination against colored men aforesaid these defendants are denied the equal protection of the law, as provided and guaranteed to them by the fourteenth amendment to the Constitution of the United States of America. Therefore these defendants move to quash the venire, and the panels of the grand and petit jurors as drawn for the present term of this honorable court.

It appears from the record proper, as well as from the bill of exceptions, that when this motion was filed the indictment had been presented by the grand jury and filed, and that the only petit jury drawn and summoned at that time was the jury for the first week of the term during which first week the case would not be for trial, and that in fact the case was not tried during said first week.

The State on December 6th, filed its motion to strike the motion of defendants above mentioned as follows: Now comes the State, by its attorney, and moves the court to strike the motion to quash
104 the venire herein, and for cause says: (1) Said motion is impertinent. (2) Said motion submits nothing to the court for consideration or determination. (3) Because said motion is not such a motion as this court can consider in these proceedings. (4) Because said motion sets up no state of facts which, if true, would justify the quashing of the venire.

The motions coming on to be heard, were argued by counsel for the State and the defendants, and the court made an order sustaining the State's motion to strike, to which ruling the defendants excepted. Thereupon on December 6th, defendants filed their motion to quash the indictment as follows: And now come the above-named defendants, and before pleading to the indictment herein, in their own proper person, and move the court to quash the indictment herein on the following good and sufficient reasons, to wit: (1) Because these defendants are citizens and residents of the State of Florida, and of the United States of America; that the county commissioners of said Escambia county, Florida, whose duty it is

made by law to select names for jury duty for and during each year, did at their meeting held in January, A. D. 1900, select a list of names for jury duty for and during the present year; that said list selected contained five hundred names, to serve as grand and petit jurors for and during the present year; that said county commissioners in selecting said list of names as aforesaid discriminated against all colored men of African descent, and refused to select any of them on account of their race, color and previous condition of servitude; that at the time of the selection of said list by said county commissioners as aforesaid there were more than fourteen hundred colored citizens and residents of said Escambia county, Florida, fully qualified for jury duty, and were so
105 known to the county commissioners at that time. (2) That from said list so unlawfully drawn and selected by the county commissioners, was selected or drawn the grand jury for the present term of this honorable court which found the indictment against these defendants. (3) That for many years the said county commissioners have discriminated against all colored men of African descent, and although there were more than fourteen hundred colored men of African descent residents and citizens of said Escambia county, Florida, yet the said county commissioners failed and refused to select the names of any of them for jury duty, they the said county commissioners well knowing that there were and are many colored men possessing qualifications as required by law. And the discrimination referred to was entirely due on account of race, color and previous condition of servitude. By this discrimination against colored men as aforesaid these defendants are denied the equal protection of the law, as provided and guaranteed by the fourteenth amendment of the Constitution of the United States of America, therefore these defendants move the court to quash the indictment herein. All of which these defendants are ready to verify.

(Signed) his
JAMES x TARRANCE.
mark.
AMOS CLARK.
DAVE POWELL.
JUDSON MOORE.
his
MARSHALL x BOYD.
mark.
WILL SMITH.
CHARLES ROBINSON.
his
W. C. x GREEN.
mark.

106 STATE OF FLORIDA, }
County of Escambia, } ss:

On this day personally appeared James Tarrance, Will Smith, Amos Clark, Judson Moore, Marshall Boyd, Charles Robinson, Dave

Powell and W. C. Green who, being duly sworn, each for himself deposes and says, he is the defendant in the above-entitled cause; that an indictment has been filed against him, charging him with the murder of one W. B. Moore; that he has read the contents of the above and foregoing motion, and that the matters and things set up are to their best knowledge, information, and belief, true as therein and thereby set forth.

Sworn to and subscribed before me this the 6th day of December, A. D. 1900.

(Signed) A. W. SPEARS,
Notary Public.

This motion coming on to be heard, was argued by counsel for the State and the defendants, and the court overruled the motion, to which ruling defendants excepted. No evidence in support of the motion was introduced or offered to be introduced by the defendants.

Thereafter on December 7th defendants were arraigned, pleaded not guilty and the case was set for trial on December 13th, and a special venire issued for seventy-five jurors to be summoned by the sheriff from the body of the county to try the case, returnable December 13th.

On December 13th the special venire was called and defendants interposed a challenge to the array as follows: And now
107 come the defendants in their own proper persons and by their attorneys, Purcell, Spears and Alston, and challenge the array of jurors drawn to try these defendants, on the ground that the sheriff of Escambia county, Florida, in selection of persons to serve on the jury to try these defendants, knowingly discriminated against all colored men of African descent, and refused and failed to select any colored persons to serve on said jury, well knowing that there are more than five hundred colored men in said Escambia county, Florida, fully qualified to serve as jurors, thus denying these defendants, they being colored men, the equal protection of the law, as guaranteed by the fourteenth amendment to the Constitution of the United States.

The challenge was submitted to the court without argument and the court overruled it, to which ruling defendants excepted. No evidence in support of the challenge was introduced or offered to be introduced by defendants.

Before the trial jury was completed three other special venires were executed by the sheriff. Defendants entered their challenges to the array upon the return of each venire—each challenge being substantially to the effect that the sheriff of Escambia county in selecting the names of persons to serve on the trial of this cause discriminated against all colored men of African descent on account of their race, color and previous condition of servitude, and knowingly refused and failed to select or summon any colored persons to so serve, although he well knew there were more than five hundred colored men of African descent in said county fully qualified
108 for jury duty, who were well known to said sheriff, by which discrimination defendants, being colored men of African de-

scent, were deprived of the equal protection of the law as guaranteed by the fourteenth amendment to the Constitution of the United States. Each of these challenges was submitted to the court and the court on consideration, overruled each of them, to each of which rulings defendants excepted. No evidence in support of either of said challenges was introduced or offered to be introduced by defendants.

Defendants moved for a new trial, which motion was overruled, to which defendants excepted. The grounds of this motion were that the court erred in striking defendants' motion to quash the venire and the panels of the grand and petit jurors, in striking defendants' motion to quash the indictment, in refusing to grant defendants' challenges to the array of the several special venires of petit jurors, and that the verdict was contrary to the law, the evidence and the charge of the court.

The errors assigned in this court are as follows: First the court erred in striking defendants' motion to quash the venire and panels of grand and petit jurors drawn and summoned for this term of our said court, on the grounds as set forth in and by their said motion to wit: the discrimination against colored men, commonly called negroes, on account of their race, color and previous condition of servitude. Second. The refusal of the court to grant defendants' motion to quash the indictment found and filed against defendants, on the grounds as set out in and by their said motion, to wit: because all colored men of the negro race have been discriminated against in selecting names of persons to serve on the grand jury that found and presented said indictment against these defendants,
109 on account of their race, color and previous condition of servitude. Third. The refusal of the court to grant defendants' several challenges to the several array of special venire of petit jurors selected and summoned by the sheriff to try these defendants, on the grounds as set forth in and by their said several challenges, on the grounds as set out by said challenges, to wit: on the ground of discrimination against colored men in the selection and summoning of said jurors, on account of their race and color. Fourth. The refusal of the court to grant defendants a new trial on grounds as set up in and by their motion.

It was not claimed upon the oral argument, nor is it claimed in the briefs, that the laws of this State prescribing the qualifications of jurors, and regulating the manner of selecting, summoning and empaneling them, discriminate against any person or class of persons on account of race, color or previous condition of servitude. Nor can such claim be successfully asserted. They disqualify no person or class of persons from jury service because of race, color or previous condition of servitude, nor do they authorize any discrimination on this account to be made by those whose duty it is to enforce the regulations prescribed for selecting, summoning and empanelling. If, therefore, the defendants have been denied the rights claimed by them under the fourteenth amendment of the Constitution of the United States, it has been done, not in obedience to the requirements of our jury laws of which the courts take judicial notice, but by the

improper conduct of those engaged in administering those laws. This improper conduct must be brought to the attention of the court by proper proceedings, and the allegations of those proceedings must be sustained by competent evidence, as the court cannot take judicial notice of such misconduct where it does not appear by the record in the case. The presumption is that those charged
110 with administering the laws have properly discharged their duty and against any misconduct on their part, until the contrary is made to appear. With these preliminary observations we shall now proceed to consider the several question- presented.

The first motion filed by defendants was to quash the venire drawn for the term, and the panels of grand and petit jurors. The venire drawn for the term at that time consisted only of the grand and petit jurors then in attendance. In so far as the panel of petit jurors was concerned the defendants had no right to move to quash that. It was summoned for the first week of the term only, and had and could have no connection whatever with defendants' case, because their case was not to be tried until a subsequent week, when another and different panel of petit jurors would be in attendance. The petit jury objected to had not been called to try defendants' case and would not be, as their term of service would under the law expire long before defendants' case would be called for trial. The defendants had no right to challenge the array of petit jurors until their case was called for trial and it was proposed to empanel upon the jury to try them some member of the objectionable panel.

As to the grand jury, the defendants had no right at that time to move to quash the panel. If defendants could properly move to quash the panel or challenge the array of grand jurors for the reasons stated in this motion, it could only be done before the grand jury was empanelled, or at least before the indictment was found. Whether it could be done in that way, we do not now decide. We are clear, however, that a motion to quash the panel of grand jurors by one who has been indicted by such jurors is not proper practice. Gladden *v.* State, 13 Fla. 623. As we shall show further on, a plea
111 in abatement of the indictment is the proper remedy. We regard the ruling sustaining the motion to strike as equivalent to holding that the motion to quash was not the proper method of raising the question sought to be raised; and while we do not approve of the practice of moving to strike a motion, we do not see that the defendants have been injured by the form of the ruling complained of. They were afterwards permitted to move to quash the indictment upon the same grounds as those embraced in this motion, and even if the matter could properly have been presented by the first motion they are not injured in this case, because they were permitted to present the same objection in another form, and were not denied the right to sustain it by proof. If we treat the motion to quash the indictment as properly raising the question sought to be presented by it, it was properly overruled, because no evidence was introduced or offered to sustain its allegations. This is true even though the motion is verified by defendants' affidavit attached thereto. Smith *v.* Mississippi, 162 U. S., 592, 16 Sup. Ct.

Rep., 900. The affidavit attached to this motion practically amounts to nothing. It does not appear that defendants had any knowledge, information or belief as to the facts alleged in the motion. The affidavit asserts none, nor do defendants swear to a single tangible fact showing any knowledge, information or belief whatever upon the subject. Ballard *v.* Eckman & Vetsburg, 20 Fla., 661; Smith *v.* State, (Miss.) 18 South. Rep. 116. Besides, the court is not authorized to quash an indictment on mere information and belief of a defendant or any other person. However, as we have already said, even if the affidavit had been positive, the court would have been justified in denying the motion in the absence of evidence, or
112 an agreement from the State or order of the court to the effect that the verified motion might be considered as evidence. There is, in our opinion, nothing in the cases cited to us by defendants (Carter *v.* Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687, and cases cited therein) in conflict with the conclusions we have reached upon this question.

We are of opinion that the proper method of presenting the question sought to be presented by this motion is by plea in abatement of the indictment, and not by motion to quash, and that the ruling upon the motion can be sustained upon that ground. It has for many years been the practice in this State, sanctioned by repeated rulings of this court, that all objections to the competency of and to irregularities in selecting, drawing and empanelling grand jurors not appearing of record, must be taken advantage of by plea in abatement of the indictment, and not by motion to quash it. Woodward *v.* State, 33 Fla. 508, 15 South. Rep. 252; Kitrol *v.* State, 9 Fla. 9; Gladden *v.* State, *supra;* Tervin *v.* State, 37 Fla. 396, 20 South. Rep. 551. See also, State *v.* Foster, 9 Tex. 65.

The objections to the special venires for petit jurors were properly presented by challenges to the array. No evidence was produced or offered to prove the facts asserted in these challenges, and the written challenges were not even verified by defendant's affidavit as was the motion to quash. The court ruled correctly in denying these challenges, because there was no evidence to sustain them. Smith *v.* Mississippi, *supra;* Yates *v.* State, 43 Fla. — 29 South. Rep. 965.

This disposes of all the assignments of error except the fourth which complains of the ruling denying the motion for a new
113 trial. All the grounds of this motion have been considered in the preceding part of this opinion, except two, viz: that the court erred in striking defendants' motion to quash the indictment, and that the verdict was contrary to the law, the evidence and the charge of the court. Neither of these grounds of the motion have been argued, and are therefore under our practice to be treated as abandoned. We will remark, however, that according to the record before us the court below did not strike the motion to quash the indictment; but, on the contrary, it was argued and submitted to the court and duly considered and overruled by it.

We find in the transcript brought to this court a mass of matter wholly unnecessary in the consideration of the points presented

Every capias with the return of the sheriff, a memorandum of the name of every juror summoned and examined in the case, and of many challenges and objections to jurors, other than those assigned as error, the stenographer's report of the testimony, consisting of over one hundred typewritten pages, and other unnecessary matters are certified to us in the transcript. The memorandum referred to and the stenographer's report of the testimony do not appear to be a part of the bill of exceptions, and for that reason should have been omitted from the transcript. As these unnecessary matters increase the cost of the case and defendants are shown to be insolvent thereby putting the expense of the prosecution upon the State or county, we shall direct our clerk in taxing the costs to allow nothing for these unnecessary matters.

The judgments of the circuit court are affirmed.

114 I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing pages, numbered from ninety-nine (99) to one hundred and thirteen (113) inclusive, constitute a true copy of the opinion of said court, as filed in my office on the 23rd day of July, A. D. 1901, in the case of James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd and W. C. Green, alias Newt. Green, plaintiffs in error, and The State of Florida, defendant in error, as appears upon the files and records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Tallahassee, the capital, this 30th day of September, A. D. 1901.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

115 In Supreme Court of the United States of America, October Term, 1901.

JAMES TARRANCE ET ALS., Plaintiffs in Error,
vs.
THE STATE OF FLORIDA, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said plaintiffs in error, by Purcell, Spears and Alston, their attorneys and say, that in the record and proceedings aforesaid, there is manifest error in this, to wit,

First. The trial court erred in striking defendants' motion to quash the venire of grand and petit jurors, on the grounds as set out in and by their said motion.

Second. The trial court erred in overruling defendants' motion to quash the indictment.

Third. The trial court erred in refusing defendants' several challenges to the array of petit jurors.

Fourth. The supreme court of Florida erred in affirming the judgment of the court below.

116 Fifth. The trial court also erred in refusing defendants' motion for a new trial on the grounds as set forth in and by their said motion.

Therefore the plaintiffs in error now pray the judgement of the supreme court of the State of Florida may be reversed, annulled and altogether held for nothing.

PURCELL, SPEARS AND ALSTON,
Pl'ffs' Att'ys.

117 [Endorsed:] In Supreme Court of the United States. James Tarrance *et al. vs.* The State of Florida. Assignment of errors.

Endorsed on cover: File No. 18,338. Florida supreme court. Term No. 485. James Tarrance, Will Smith, Amos Clark *et al.*, plaintiffs in error, *vs.* The State of Florida. Filed December 4th, 1901.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

JAMES TARRANCE ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF FLORIDA.

IN ERROR TO THE SUPREME COURT OF FLORIDA.

Motion for Leave to Docket Without Payment of Costs, and to Advance.

And now come the plaintiffs in error, James Tarrance, Will Smith, Amos Clark, Judson Moore, Charles Robinson, Dave Powell, Marshall Boyd, and W. C. Green, alias Newt Green, by their attorney, I. L. Purcell, and show unto the court that they were convicted at the December term, circuit court, Escambia county, Florida, of murder in "third degree;" that said cause was taken up to the supreme court of Florida, and at the June term thereof, A. D. 1901, the judgment of the lower court affirmed.

That plaintiffs are poor and are not able to pay cost for

docketing case; that in the supreme court of Florida plaintiffs proceeded under the insolvent laws of the State.

See insolvent affidavits in record certified to this honorable court, pages 79 and 81 and 82.

Therefore plaintiffs pray that their case be docketed without prepayment of costs, and that the same be set for hearing at an early date, on or before April 1, 1902.

And your petitioners will ever pray.

I. L. PURCELL,
Plaintiffs' Attorney.

No. 202

Motion to advance.

FILED
DEC 30 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed Dec. 30, 1901.

OCTOBER TERM, 1901.

JAMES TARRANCE ET AL., Plaintiffs in Error.

vs.

THE STATE OF FLORIDA, Defendant in Error.

Motion to Advance Cause on Docket.

And now come plaintiffs in error, by their attorney, I. L. Purcell, and show unto this Honorable Court,

FIRST: They were convicted in Circuit Court, Escambia County, Florida, in December, A. D. 1900, and have since been confined in the county jail of said Escambia County, and are now so confined.

SECOND: That during their trial in Circuit Court, being discriminated against in the selection of jurors, in that all

colored men of the Negro race were discriminated against, plaintiffs being colored men of the Negro race, objected to the jury on account of said discrimination; their contention being based under Art. I, 14th Amendment, Constitution of the United States. Contention denied; case appealed to State Supreme Court and finally to this honorable Court.

THEREFORE; Inasmuch as your petitioners have been confined in jail here for 20 months at great expense to the said Escambia County, and in restraint of their liberty, are desiring and praying that their cause may be heard at an early date and that right and justice be done in the premises, therefore move this honorable Court to advance said cause on the docket and that same be set for hearing April 15th, 1902.

I. L. PURCELL,
Attorney for Plaintiffs in Error.

P. O. Box 308,
Pensacola, Florida.

Office Supreme Court U. S.
FILED
APR 14 1902
JAMES H. McKENNEY,
Clerk.

No. 485. 202

Brf. of Purcell for P. E.

Filed April 14, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 485,

JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, CHARLES ROBINSON, DAVE POWELL, MARSHAL BOYD and W. C. GREEN, alias NEWT GREEN, PLAINTIFFS IN ERROR,

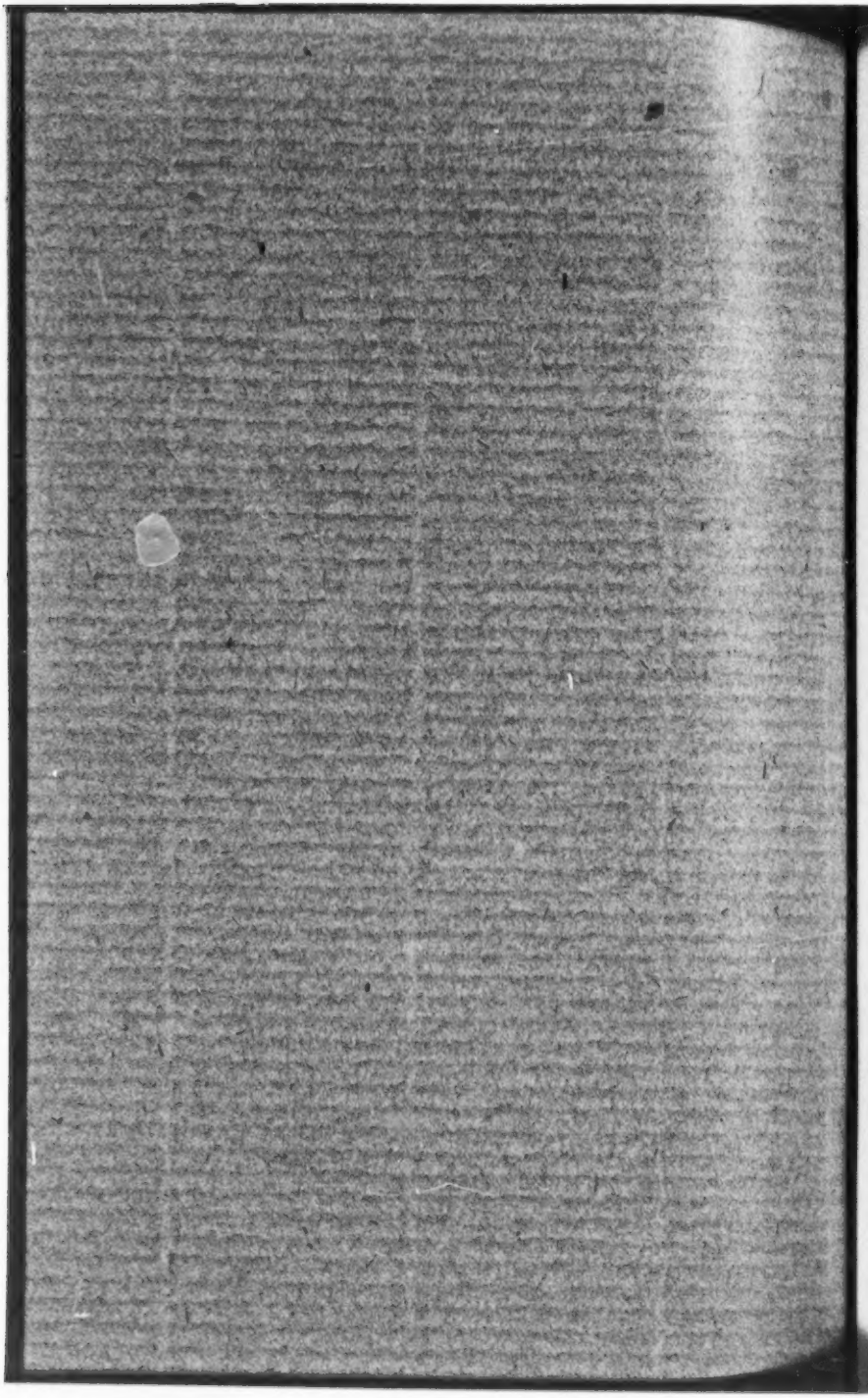
vs.

THE STATE OF FLORIDA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

ISAAC L. PURCELL,
Attorney for Plaintiffs in Error.

W. H. Campbell, Job Printer, Pensacola, Fla.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 485,

JAMES TARRANDE, WILL SMITH, AMOS CLARK, JUDSON MOORE, CHARLES ROBINSON, DAVE POWELL, MARSHAL BOYD and W. C. GREEN, alias NEWT GREEN, PLAINTIFFS IN ERROR,

vs.

THE STATE OF FLORIDA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

At the Fall Term, A. D. 1900 of the Circuit Court, Escambia County, Florida, Plaintiffs in error were indicted for the murder of one W. B. Moore, a white man, and convicted at the same term of murder in the third degree, and sentenced to fifteen years in state prison; and from the sentence imposed sued out writ of error to the Supreme Court, State of Florida, being the highest state court having jurisdiction over the cause; which said court affirmed the judgments of the court below. From the decision of the State Supreme Court sued out writ of error to this Honorable Court.

The question passed on by the state court was the claim of plaintiffs in error that all colored men, or men of the Negro race, were discriminated against in the selection of names for jury duty in Escambia County by the county commissioners of said county, on account of race, color and previous condition of servitude, and that this discrimination not only by the county commissioners, but by the sheriff of said county, had refused and failed to select or summon any colored men either on the grand jury which found and presented the indictment against plaintiffs in error, as also the petit jury which was to try their cause.

Inasmuch as they are colored men, or negroes, this discrimination against their race, simply on account of their race and color, was a discrimination against plaintiffs, and denial to them of the equal protection of the law as guaranteed to them by the 14th amendment to the Constitution of the United States; plaintiffs being members of the Negro race.

At the trial in the Circuit Court, and after indictment was presented and filed, but before pleading thereto, defendants in the court below, filed a motion to quash the venire of grand jurors, also the 8 remaining petit jurors. (See page 26 of printed record.)

The State filed its motion to strike defendants' motion (See motion page 28 of printed record); which said motion to strike coming on to be heard, was argued by counsel for the State and the defendants, and the court made an order, sustaining the State's motion to strike; to which ruling the defendants then and there objected and assign the same as error

Thereupon on December 6th, defendants filed their motion to quash the indictment; (See motion page 27 of printed record.) To this motion no objections were interposed by the State; the allegations were neither denied or traversed but were overruled by the court; to which ruling the defendants excepted, and was assigned as error in the State Supreme Court. On 7th of December, 1900, plaintiffs in error, defendants, in the court below were arraigned, pleaded not guilty and case set for trial December 13th. A special venire issued for seventy-five jurors to be summoned by the sheriff from the body of the county, to try the case, returnable December 13th.

On December 13th special venire called and defendants interposed a challenge to the array.(see challenge page 31 of printed record.) Whereupon the court did consider the challenge and denied the same; to which defendants excepted and assigned same as error. The State did not join issue on challenge and the truth of the allegations was neither denied

or traversed.

Before the trial jury was empanelled, three other special venires were returned by the sheriff, defendants entering challenget to the array upon return of each venire. (see challenges pp. printed record.) Same were neither denied nor traversed by the State; each of which was over-ruled by the court, and ruling excepted to by defendants. Trial panel having been completed, trial commenced; the case being given to the jury, which returned a verdict of "murder in the third degree."

Defendants then moved for new trial, which motion was over-ruled, to which defendants excepted. The grounds of this motion were that the court erred in striking defendants' motion to quash the venire and panels of gaand and petit jurors, in striking defendant's motion to quash the indictment, in refusing to grant the defendants' challenges to the several special venires of petit jurors, and that the verdict was contrary to the law, the evidence and the charge of the court.

The errors assigned and argued were:

1. The court erred in striking defendants' motion to quash the venire and panels of grand and petit jurors.
2. The court erred in refusing defendants' motion to quash the indictment.
3. The refusal of the court to grant defendants' several challenges to the array of the several special venires.
4. The refusal of the court to grant defendants' motion for a new trial.

This cause came on to be herd before the Supreme Court of the State of Florida, June term thereof, 1901, was orally argued and submitted on brief, the only questions raised and discussed being the errors as above stated; the Supreme Court denying contentions of plaintiffs in error and affirming the decision of the Circuit Court.

The opinion of the Supreme Court of the State of Florida will be found in the printed record pp. We republish this opinion and make it a part of this brief under the head of "appendix A."

From the judgment sustaining the trial court, the plaintiffs in error appealed to this court, a writ of error having been allowed by the Chief Justice of the Supreme Court of Florida.

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Escambia County, Florida erred in striking defendants' motion to quash the petit and Grand Jurors on the grounds set out in and by their said motion.

2. The Circuit Court of Escambia County, Florida erred in rejusing defendants' motion to quash indictment therein, on the grounds set forth in and by their said motion.

3. The Circuit Court of Escambia County, Florida, erred in refusing defendants' several challenges to the array of the several special venires on the grounds therein set forth.

4. The Circuit Court of Escambia County, Florida, erred in refusing defendants' motion for a new trial on the grounds as set up in and by said motion.

5. The Supreme Court of the State of Florida erred in affirming the findings of the Circuit Court of Escambia County Florida.

ARGUMENT.

We do not contend that colored men are discriminated against by any law of this state in the selection of names for jury duty, nor do we contend that a Negro being tried for a criminal offense, is entitled to a jury composed wholly or in part of members of his race; but do claim that when a Negro is tried for a criminal offense, he is entitled to a jury selected without any discrimination against his race on account of race, color or previous condition of servitude; and when this is not the case, he is denied the equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States.

The Supreme Court of Florida in its opinion in the case at bar says: "It was not claimed upon oral argument nor is it claimed in the briefs, that the laws of this state prescribing the qualifications of jurors and regulating the manner of selecting, summoning and empanelling them, discriminate against any person or class of persons on account of race, color or previous condition of servitude. (see opinion page of printed record.) It is true that there is no discrimination created by law, but it must be admitted by all fair minded men that in the State of Florida in the selection of jurors to serve in our courts, the county commissioners and sheriffs, whose duty it is made by law to select names for jury duty, discriminate against all Negroes and refuse and fail to select any for jury duty simply on account of their race and color, and as Mr. Justice Matthews, in delivering the opinion of the the Court in Yick vs Hopkins, 118 U, S. 256, as though hav-

ing in view, as he did, that such invasion might depend upon the whim or caprice of some man or set of men, as in this state, forcibly said: "The very idea that one man may be compelled to hold his life or means of living or any material right to the enjoyment of life at the mere will of another, seems to intollerable in any country where freedom prevails as being the essence of slavery itself." And again, in the same opinion, it is said: "Though the law itself be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This principle has been santioned by this Court in Hendervs. Mayor of New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U S. 275; ex-par-e Virginia, 100 U. S. 329.

The 14th amendment, as stated by Mr. Justice Matthews in Yick Wo vs Hopkins, 118 U. S. 355, 357, quoting from the opinion of this Court in Barber vs. Connelly, 113 U. S. 27: "undoubtedly intended that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediments should be interposed to the pursuits of any one, except as applies to any one under like circumstances; that no greater burdens should be loaded upon one than are loaded upon others in the same calling and condition, and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences," etc.

These authofities go to show conclusively that where the discrimination is made by officers of the law, the equal protection of the law is equally denied.

Now let us discuss the case as presented by the record. Our contention briefly stated is this:

1. Defendants' motion in the trial court to quash the venire of grand and petit jurors ought to have been granted.

2. Defendants' motion to quash the indictment ought to have been granted and the indictment quashed.

3. Defendants' challenges to the several special venires

of petit jurors ought to have been granted.

4. The allegations of the motions and challenges having been duly made and not having been either denied or traversed by the state, there was no necessity on the part of defendants to introduce evidence to prove allegations.

First; That defendants' motion to quash the venire of grand and petit juries ought to have been granted.

The State Supreme Court, in its opinion, claims that at the time of making defendants motion to quash the panel of petit jurors, defendants' case had not been set, hence they had no right to move at that state of the proceedings. We contend that it was the proper time. Defendants' case was called for trial, if they had entered their plea to the indictment, trial, under our practice, would have commenced; therefore the motion was timely and the court should not have stricken same, but ought to have considered it. We state here and are borne out by the rulings of the trial court and the tenor of the motion by the State's Attorney that the court below considered all motions and challenges as being impertinent, and that even if the allegations were true, the court would not be justified in quashing the indictment and granting the several challenges to the array of the several special venires. To defendants' motion to quash (see motion page of printed record) the state filed the following motion to strike defendants' motion in the following words:

"And now comes the State, by its attorney, and moves the court to strike the motion to quash the venire herein and for cause, says:

1. Said motion is impertinent.
2. Said motion submits nothing to the court for consideration or determination.
3. Because said motion is not such a motion as this court can consider in these proceedings.
4. Because said motion sets up no state of facts which if true would justify the quashing of the venire."

Which said motion was granted and defendants' motion stricken.

We contend, defendants' motion ought to have been considered.

Let us briefly discuss the motion to strike, as also defendants' motion to quash.

First; Was defendants' motion pertinent.

We contend it was and raised the question of discrimination against Negroes in the selection of jurors and, in as much as defendants are Negroes, they were discriminated against,

thus denied the equal protection of the law as guaranteed by 14 Amendment to Constitution of the United States.

Second; The motion submits for the consideration of the court these facts as set up. and the court ought to have considered and determined whether or not the allegations were true.

Third; We contend the motion was a proper one, and the question raised could be either by plea in abatement or motion to quash See Ellis vs State 25 Fla. 703, also Potsdamer vs state 28 Fla. 895.

This proposition we will discuss more fully further on.

Fourth; The state of facts as set up by defendants' motion, if true would justify the quashing of the venire. Carter vs. Texas 177 U. S. 442.

You will perceive contention of the state was, all through the trial, that the facts as set out in and by defendants' motion, even if true, would not justify the quashing of the indictment, however, this honorable Court has repeatedly said, when all colored men are discriminated against in selecting jurors for the trial ofa Negro on a criminal charge, simply on account of color &c., the equal protection of the Law is denied. see Carter vs Texas, 177 U. S. 442.

Second. We contend it was error in refusing defandants motion to quash the indictment on the grounds as set out in and by said motion. see page of printed record.

The state neither denied nor traversed the motion, is sworn to and, inasmuch as, the allegations therein set forth are not denied, they are admitted to be true, and if true, the motion ought to have been granted and the indictment quashed, since, defendants would be denied the equal protection of the law as contemplated by the 14 Amendment Constitution of the United State. See 14 Amendment Sec. I,, also Carter vs Texas as 177 U. S. 442 and authorities.

It is contended that in the trial court defendants neither introduced nor offered to introduce any evidence to prove the allegation of their motion, we contend that in this case, the state did not join issue, did not traverse or deny the truthfulness of the allegations. hence defendants were not called on to prove facts and allegations not denied.

In Carter vs Texas 177 U. S. 442 the Court say.

"The motion to quash on such a ground being based on allegations, if controverted by the attorney of the state, must be supported by evidence on the part of defendant," citing Smith vs Mississippi 162 U. S. 592 et seq. Williams vs Mississippi, 170 U. S. 213. approvingly, hence, we conclude from the language as used by the Court in the Carter case, that

when the allegations, are not controverted by the state, they are admitted as true, and in such case, the defendant is not called upon to prove allegations which, he asserts to be true and are not denied by the state's attorney, hence we contend that in the case at bar, the allegations made by defendant, not being denied, or traversed by the state, were accepted as true.

As Mr. Justice Harlan in delivering the opinion of the Court in Neal vs. Delaware, 103 U. S. 370, says: "But passing by the ruling of the court below as insufficient, in itself, to authorize a reversal of the judgment, we are of opinion that the motion to quash, sustained by the affidavit of the accused, which appears to have been filed in support of the motion, without objection to its competency as evidence, and was uncontradicted by counter affidavits or even formal denial of the grounds assigned, should have been sustained. If, under the practice which obtains in the courts of the state, the affidavit of the prisoner could not, if objected to be used as evidence in support of a motion to quash, the state could waive that object on, either expressly or by not making it at the proper time. No such objection appears to have been made by its Attorney General at the trial."

In the case at bar, we contend that inasmuch as the state's attorney did not object to the sufficiency of motion and the affidavits of the defendants attached thereto at the trial of the cause, all objections thereto were waived by the state; because, as said supra: "the state could waive that objection either expressly or by not making it at the proper time." And in this case the state did not even make a formal denial of the allegations.

The motion asserted there were equally as many Negroes in Escambia County qualified for jury duty as white men; the county commissioners knew this to be true, and yet knowingly failed and refused to select any for jury duty because of their race and color; there being no denial to the facts, we most respectfully contend, presented a prima facie case of denial by the officers charged with the selection of jurors, of that equality of protection which has been secured by the 14th amendment to the Constitution; hence the motion should have been granted and the indictment quashed.

The Supreme Court of Florida, in passing on the motion to quash, says: "We are of the opinion that the proper method of presenting the question sought to be presented by this motion is by plea in abatement of the indictment, and not by motion to quash, and that the ruling upon the motion can be sustained upon that ground." Citing Woodward vs. State, 35 Florida, 508; Kitrol vs. State, 9 Florida 9; Gladden vs. State,

Tersin vs. State, 37 Florida, 396. (See page of printed record.) We contend that in Florida the question can be properly raised either by motion to quash or by plea in abatement of the indictment.

Now let us review the decisions of the Florida Supreme Court on the question. In Ellis vs. the State of Florida, 25 Florida, 702, this is a case in which the contention that some of the grand jurors who found the indictment were not at the time of finding said indictment, registered voters of Marion County and were not qualified to sit on the grand jury, etc. This is a matter clearly not appearant on the face of the indictment, yet at page 711 the court says: "This objection comes too late when first made in the motion for new trial, as objections that relate to the summoning, qualifications and organization of the grand jury must be taken by motion or plea in abatement before pleading to the indictment;" citing approvingly Gladden vs State 13 Fla. 623; Buroughs vs State 17 Fla 643; Potsdamar vs State, 17 Fla., 895.

In Potsdamar vs State, the court says, "Objection to the manner of summoning, empanelling and qualifications of grand jurors must be taken by plea in abatement or motion to quash before pleading to the indictment.

The only decision of our Supreme Court I have been able to find sustaining the proposition, that the only way to reach the objection to the empanelling of the grand jury is by plea, is reported in 37 Fla. McTervin vs State at page 403, the court says, "If there was any such irregularity in the drawing or empannelling of the grand jury that found indictment as would render such indictment void or illegal, the proper way to make it appear was by plea in abatement, instead of by motion to quash."

The facts in this case are the same as in the cases cited above, and the court clearly reverses its former decisions, on the same question; with this showing, if we are to consider former decision of the Florida Supreme Court, as being of any value, bearing on the question, we contend that the question raised by defendants as to the grand jury could be properly raised either by motion to quash or by plea in abatement.

Third. We contend that the court erred in refusing or denying defendants several challenges to the array of petit jurors. See challenges at pages of printed record.

The supreme court of Florida in its opinion, at page of printed record says, "The objections to the special venires for petit jurors were properly taken by challenges to the array. No evidence was produced or offered to prove the facts as-

sented in these challenges, and the written challenges were not even verified by defendants affidavits as was the motion to quash. The court ruled correctly in denying these challenges, because there was no evidence to sustain them."

If the challenges to the array of the several special venires of petit jurors were proper, and of this there is no contention, then we contend, inasmuch as, the challenges were not denied or traversed by the state, the allegations were taken and accepted as true, therefore the challenges ought to have been sustained and the special venires quashed.

But, says the supreme court of Florida, the challenges were not sworn to; that is true but, at the common law no affidavit is required but the challenge must be in writing.

"At common law every challenge either to the array or to the polls was required to be propounded in such a way that it might be put upon the record, and that too, with great particularity." Thompson and Merriam on Juries, pages 246 sec. 231. We contend, that according to the weight of authority, it is not necessary for a challenge to be sworn to or even, perhaps, reduced to writing; however, if there were any defects in the challenges, the state by its attorney should have taken advantage of such in the trial court, not having done so, all such objections were waived, and came too late when first brought in the appellate court.

To the challenges filed by defendants, the state did not demur ,which would have brought into consideration the legality of the matter of challenge, or counter plead, by setting up some new matter consistent with the matter of challenge, to vacate or anul it as ground of challenge, or deny what was alleged as matter of challenge. None of this was done; not even a formal denial of the matter set up in challenge was made. The several special venires of jurors were present before the court, and there being no Negroes on any of said special panels, yet the court considered the challengas, considered them to be sufficient in law, and denied the same. We contend thot since defendants had repeatedly called the attention of the trial court to the fact that in the selection of jurors, all Negroes had been discriminated against by the officers of the law in selecting names for jury duty, simply because of their color, first by motion to quash the venires of grand and petit jurors, filed and considered December 6th, 1900, Second by motion to quash indictment on same date. Then on December 13th, 1900 by challenge to the array of the regula venire of jurors, then again on December 13th by challenge to the array of the special venire of 75 petit jurors selected by the sheriff for the trial of defendants, which was

denied. And again on the same day filed their challenge to the array of special venire of 8, which challenge was denied; then again on the same day defendants challenged the special venire of 12 men selected by the sheriff to try defendants' case, which said challenge was denied. On December 14th the trial panel not having been completed, a special venire of 6 was returned, defendants again challenged the array of the special venire, which said challenge was denied. We call the Court's special attention to the motions and challenges made by defendants from which you will see repeatedly called the attention of the court to this discrimination, alleging in their said motion, that the county commissioners had discriminated against all Negroes in the selection of names for jury duty, that none had been selected either on grand or petit juries, and this discrimination purely on account of race and color. These allegations were not denied, in fact, the state could not deny the statement that no Negroes were on the grand jury which found the indictment and the petit jurors summoned to try the defendants, because the panels were in the view of the court, and there could be no doubt of the fact that no Negroes had been selected on either of said panels. This fact is admitted, it could not be otherwise, then the only remaining question is, why were Negroes discriminated against by the commissioners? We say on account of their race and color; the state does not deny the fact, hence we contend they admit Negroes were excluded simply on account of their race and color.

We again most respectfully call your attention to the fact that during the empanelling of the jury, there were four special venires returned by the sheriff each of which defendants challenged the array, because the sheriff had discriminated against all Negroes. (See challenges pp. of of printed record.)

Page of printed record shows that on the 13th day of December 1900, defendants filed motion to quash the array of the special venire of seventy-five men because the sheriff in selecting jurors to try defendants, discriminated against all Negroes simply on account of their race and color. On the same day there was another special venire of eight selected by the sheriff, of which no Negroes had been selected; and again on the same day a special venire of twelve, no Negroes being selected, challenge again to the array, and again a special venire of twelve no Negroes selected. Again on the 14th a special venire of six and no Negroes selected; in the four special venires selected by the sheriff, not a single Negro selected, and this after having called the attention of the

court that the sheriff was discriminating against Negroes in the selection of persons for jury duty, and simply on account of their race, color and previous condition of servitude; and the fact that the charges were not even formally denied by the state, and the fact that all Negroes were discriminated against could not be denied. Since none were selected we contend is prima facie evidence of discrimination on on account of race and color, and if not true, should have been denied by the state; because if it was incumbent on defendants to prove the motive or reason why the sheriff failed to select any Negroes, other than by his actions, would be to require the state to prove intent in a criminal cause by evidence other than by the actions of the party accused. We can only prove motive or reason of the sheriff in not selecting Negroes by the fact that he did refuse and fail to select any Negroes, and when charged with this discrimination, makes no explanation, but on the contrary continues to discriminate, and in the case at bar selects 4 special venires consisting of 101 men, and not selecting a single Negro in the face of the showing made by the defendants, we contend make a prima facie case of denial by the officers charged with the selection of grand and petit jurors, of that equality which has been secured by the Constitution and laws of the United States. And as is said by Mr. Justice Harlan in Neal vs. Delaware, 103 U. S., in rendering the decision of this honorable Court: "The action of these officers is to be deemed the act of the state; and the refusal of the state court to redress the wrong by them committed, was a denial of a right secured to the prisoners by the Constitution and laws of the United States. Speaking by Mr. Justice Strong in Ex-parte Virginia, we said and now repeat: A state acts by its legislative, its executive or its judicial authorities. It can in no other way. The constitutional provision, therefore, must mean that no agency of the state or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's authority, his act is that of the state. This must be or the constitutional prohibition has no meaning,' Ex-parte Virginia, 100 U. S. 347."

In the case at bar we contend that inasmuch as the state acts through its officers, the record shows that these officers did discriminate against all Negroes, simply on account of

their race and color, therefore defendants, in the court below, were denied the equal protection of the law as contemplated by Sec. 1, 14th Amendment to the Constitution of the United States

The challenges should have been granted and the venires quashed; and we insist that the refusal of the trial court to grant defendants' challenges was clearly a denial to the defendants of the equal protection of the laws and the finding of the state court should be reversed.

But the Supreme Court of Florida say the defendants in the court below did not sufficiently call the attention of the court to the matters complained of by them, that they offered no evidence to support their contention. This contention has been fully discussed in the preceeding pages, however, we contend: "the question weather a right or privilege claimed under the Constitution or laws of the United States was sufficiently pleaded and brought to the notice of a state court, is itself a Federal quesiion, in the decision of which this court on writ of error, is not concluded by the view taken by the highest court." Neal vs. Delaware, 103 U. S. 370; Mitchell vs. Clark, 110 U. S. 633; Boyd vs. Nebraska, ex rel. Teayer 143 U. S. 135; Carter vs. Texas, 177 U. S.

And we most respectfully submit, your Honors, that in the case at bar, the attention of the trial court was sufficiently called to the rights and privileges claimed by defendants under the Constitution of the United States; their contentions should have been sustained, and the refusal of the State Court to sustain same, was a denial to defendants of the equal protection of the laws, We insist that the action of the state courts in denying the defendants the equal protection of the laws, is a violation of their constitutional rights, a denial to them of a fair and impartial trial by a fair and impartial jury of their country, selected and empanelled without any discrimination against them on account of their race, color or previous condition of servitude, and tends to corrupt the jury system and to made despots and masters of one class of our citizens, serfs and slaves of the other.

ERRATA.

Last paragraph on page 7 should read: "The motion to quash on such grounds being based on allegations of facts not appearing in the record, these allegations, if controverted by the attorney, for the state, must be supported by evidence on the part of the defendant."

No. 485

FILED
APR 16 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Lamar for D. E.

Filed April 16, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 485.

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vs.

THE STATE OF FLORIDA, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

W. B. LAMAR,
Attorney General of Florida
and for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2823

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THE STATE OF FLORIDA, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

ARGUMENT.

(1.) The first motion filed in this case in the circuit court in the State of Florida was to quash the venire drawn for the term, and the panels of grand and petit jurors. The motion was not well made. The petit jury so objected to could not have tried defendants below (plaintiffs in error here) for the reason that their term of service would expire before defendants' case was called for trial.

(2.) The motion to quash the panel of the grand jurors was not well made or taken.

An indictment had been found against defendants below (plaintiffs here).

A plea in abatement of the indictment was the only proper remedy. This is the uniform practice in the courts in the State of Florida. This ruling upon a question of judicial procedure in a State by the highest State courts will not be interfered with by this court. Such ruling is binding upon this court. This is the uniform ruling of this court.

(3.) The ruling of the circuit court below was correct in denying the challenges to the array of the special venires for petit jurors.

No evidence was adduced in support of the facts asserted in such challenges.

And, besides, the written challenges were not verified by affidavit.

From the opinion of the supreme court of Florida the following quotation is submitted:

"It was not claimed upon the oral argument, nor is it claimed in the briefs, that the laws of this State prescribing the qualifications of jurors, and regulating the manner of selecting, summoning, and empaneling them, discriminate against any person or class of persons on account of race, color, or previous condition of servitude. Nor can such claim be successfully asserted. They disqualify no person or class of persons from jury service because of race, color, or previous condition of servitude, nor do they authorize any discrimination on this account to be made by those whose duty it is to enforce the regulations prescribed for selecting, summoning, and empaneling. If, therefore, the defendants

have been denied the rights claimed by them under the Fourteenth Amendment of the Constitution of the United States, it has been done, not in obedience to the requirements of our jury laws of which the courts take judicial notice, but by the improper conduct of those engaged in administering those laws. This improper conduct must be brought to the attention of the court by proper proceedings, and the allegations of those proceedings must be sustained by competent evidence, as the court cannot take judicial notice of such misconduct where it does not appear by the record in the case. The presumption is that those charged with administering the laws have properly discharged their duty and against any misconduct on their part, until the contrary is made to appear."

The judgment of the supreme court of Florida should be affirmed.

W. B. LAMAR,
Attorney General of Florida
and for Defendant in Error.

Supreme Court of the United States.

No. 202.—October Term, 1902.

James Tarrance, Will Smith, Amos Clark, et al., Plaintiffs in Error, *vs.* The State of Florida. } In error to the Supreme Court of the State of Florida.

[February 23, 1903.]

Mr. Justice Brewer delivered the opinion of the Court.

Plaintiffs in error were convicted in the Circuit Court of Escambia County, Florida, of the crime of murder and sentenced to fifteen years in prison. The Supreme Court of the State having affirmed this sentence, (30 S. R. 685,) the case was brought here on writ of error.

The contention of plaintiffs in error is that they were denied the equal protection of the laws by reason of an actual discrimination against their race. The law of the State is not challenged but its administration is complained of. As said by their counsel:

"We do not contend that the colored men are discriminated against by any law of this State in the selection of names for jury duty, nor do we contend that a negro being tried for a criminal offense is entitled to a jury composed wholly or in part of members of his race; but do claim that when a negro is tried for a criminal offense he is entitled to a jury selected without any discrimination against his race on account of race, color or previous condition of servitude; and when this is not the case, he is denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States."

Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law. But such an actual discrimination is not presumed. It must be proved or admitted. The record discloses these facts: On December 3, 1900, a grand jury was empanelled, and on December 5 returned an indictment charging the defendants with the crime of murder. On December 5 they filed a motion to quash the venire and the panels of the grand and petit jurors. In the motion it was stated that there was in the county as many colored citizens of sound judgment, approved integrity, fair character and fully qualified for jury duty as white, and stated as grounds for the motions "that the county commissioners, in selecting the lists of names for jury duty for and during the present year, discriminated against all colored men of African descent, on account of their race, color and previous condition of servitude, and from said lists were drawn the grand jury which found the in-

dictment against these defendants and the petit jury which is to try them." And that "for many years all colored men of African descent have been discriminated against, and none have been selected or drawn or summoned as grand or petit jurors in this or in any of the courts of this county, although there are more than fourteen hundred colored men in said county, a large number of whom are taxpayers, and of approved integrity, fair character, sound judgment and intelligence, well known to the county commissioners to be such, and this discrimination is based entirely on race, color and previous condition of servitude."

On December 6 the State's attorney moved the court to strike out the defendants' motion on the grounds that it was impertinent, submitted nothing for the court's determination or consideration, was not such a motion as the court could consider, and set up no state of facts which, if true, would justify the quashing of the venire. On the same day this motion of the State's attorney was sustained, and the motion of the defendants to quash was stricken out. On the same day they filed a motion to quash the indictment on substantially the same grounds. This motion was overruled. Special venires were issued before the trial jury was finally empanelled, and as one by one these venires were returned the defendants challenged the array of jurors on the ground that the sheriff in the selection of jurors knowingly discriminated against all colored men, and refused and failed to select any to serve on the jury, although knowing that there were more than five hundred colored men in the county fully qualified to serve. No evidence was received or offered in support of any of these several motions except an affidavit of the defendants attached to the motion to quash the indictment, stating that the facts set up in the motion were true "to their best knowledge, information and belief."

In respect to all these motions, except the one to quash the venire and panels of the grand and petit jurors, it is sufficient to refer to *Smith* v. *Mississippi*, (162 U. S. 592, 600;) *Carter* v. *Texas*, (177 U. S. 442.) In the first case the motion to quash was supported by an affidavit similar to the one here presented, and it was held no evidence of the facts stated, and that therefore the denial of the motion was not erroneous. In the second case the bill of exceptions showed that the defendant asked leave to introduce witnesses and offered to introduce witnesses to prove the allegations in his motion, but that the court refused to hear any evidence in support of the motion, but overruled it without investigating into the truth or falsity of the allegations therein, and this was adjudged error.

We pass, therefore, to a consideration of the ruling on the first motion. No evidence was received or offered in its support, but the motion itself was stricken out, and it is contended that the motion to strike out was equivalent to a demurrer which admitted the truth of the allegations challenged thereby, and in support thereof *Neal* v. *Delaware*, (103 U. S.

370,) and *Mitchell* v. *Clark*, (110 U. S. 633,) are cited. But in the former case the court held that an agreement by the attorney general, appearing for the State, was to be regarded as an admission of the truth of the facts stated in the motion and therefore waived the necessity for further evidence; and in the second case there was only a distinct ruling upon a demurrer to a plea.

In reference to the action of the trial court in this matter the Supreme Court of the State said:

"The first motion filed by defendants was to quash the venire drawn for the term, and the panels of grand and petit jurors. The venire drawn for the term at that time consisted only of the grand and petit jurors then in attendance. In so far as the panel of petit jurors was concerned, the defendants had no right to move to quash that. It was summoned for the first week of the term only, and had and could have no connection whatever with defendants' case, because their case was not to be tried until a subsequent week, when another and different panel of petit jurors would be in attendance. The petit jury objected to had not been called to try defendants' case and would not be, as their term of service would under the law expire long before defendants' case would be called for trial. The defendants had no right to challenge the array of petit jurors until their case was called for trial, and it was proposed to empanel upon the jury to try them some member of the objectionable panel.

"As to the grand jury, the defendants had no right at that time to move to quash the panel. If defendants could properly move to quash the panel or challenge the array of grand jurors for the reasons stated in this motion, it could only be done before the grand jury was empanelled, or at least before the indictment was found. Whether it could be done in that way, we do not now decide. We are clear, however, that a motion to quash the panel of grand jurors by one who has been indicted by such jurors is not proper practice. (*Gladden* v. *State*, 13 Fla. 623.) As we shall show further on, a plea in abatement of the indictment is the proper remedy. We regard the ruling sustaining the motion to strike as equivalent to holding that the motion to quash was not the proper method of raising the question sought to be raised; and while we do not approve of the practice of moving to strike a motion, we do not see that the defendants have been injured by the form of the ruling complained of.

* * * * * *

"We are of opinion that the proper method of presenting the question sought to be presented by this motion is by plea in abatement of the indictment, and not by motion to quash, and that the ruling upon the motion can be sustained upon that ground. It has for many years been the practice in this State, sanctioned by repeated rulings of this court, that all objections to the competency of and to irregularities in selecting, drawing and empanelling grand jurors, not appearing of record, must be taken advantage of by plea in abatement of the indictment, and not by motion to quash it. (*Woodward* v. *State*, 33 Fla. 508; *Kitrol* v. *State*, 9 Fla. 9; *Gladden* v. *State*, *supra*; *Tervin* v. *State*, 37 Fla. 396. See also *State* v. *Foster*, 9 Tex. 65.)"

The authorities cited in this opinion sustain the propositions laid down. In *Kitrol* v. *The State*, (9 Fla. 9, 13,) it was said:

"We are, therefore, of the opinion that the incompetency of the grand jurors, by whom indictment is preferred, may be pleaded by the defendant in abatement."

In *Gladden* v. *The State*, (13 Fla. 623, 630,) the court uses this language:

"In Massachusetts, New York and other States, it has been held that objections to the legality of the returns of grand jurors cannot affect an indictment found by them after it has been received by the court and filed; that such objection must be interposed before indictment found, and even before the grand jury is sworn. But it seems to be now settled that such objection may be made by plea in abatement to the indictment at any time before pleading in bar. This is substantially the rule announced by the Supreme Court of this State in *Kitrol* v. *The State*, (9 Fla. 9.) The opinion of the Supreme Court of Mississippi in *McQuillen* v. *The State*, (8 S. & M. 587,) delivered by Chief Justice Sharkey, announces what we consider the true and correct practice in such a case. Such matters are reached by plea in abatement only, (though in some States a challenge to the array is treated, we do not say properly so, as a substitute for a plea in abatement) and matters in abatement in criminal as well as in civil cases must be pleaded before pleading in bar."

In *Burroughs* v, *The State*, (17 Fla. 643, 661,) where the validity of the composition of the jury was sought to be challenged on a motion in arrest of judgment, the court said:

"Aside from the fact that there is no such bill of exceptions as is required to present any question of that character to this court, if it had been properly raised, we are of the opinion, that all objections to the legality of grand jurors must be made by plea in abatement to the indictment before pleading in bar. Such is the rule as announced by this court in *Gladden* v. *The State*, (13 Fla. 623.)"

The force of this decision is not weakened by what was said by the same court in *Potsdamer* v. *The State*, (Id. 895, 897):

"The rule is that such objections must be taken by motion or plea in abatement before pleading to the indictment. It is not proper ground of a motion for a new trial;"

for *Gladden* v. *The State* and *Burroughs* v. *The State* are both cited as authority. What kind of a motion the Chief Justice had in mind when he spoke of "motion or plea in abatement" is not disclosed. At any rate, such a general statement cannot be considered as overruling prior decisions.

In *Tervin* v. *The State*, (37 Fla. 396,) the ruling of the court was expressed in these words (p. 403):

"On the 25th of October, 1895, the defendant moved to quash the indictment and for his discharge upon the ground that 'there is nothing upon the records of this court to show that the grand jurors who found the indictment were drawn in accordance with chapter 1015 of the acts of the legislature of A. D. 1891.' This motion was overruled, and such ruling constitutes the fourth assignment of error. There is no merit in

this assignment. If there was any such irregularity in the drawing or empanelling of the grand jury that found the indictment as would render such indictment void or illegal, the proper way to make it appear was by plea in abatement, instead of by motion to quash."

Neither is there anything in the cases referred to by counsel for plaintiff in error against this ruling. So we have not merely the declaration of the court in this particular case as to the practice to be observed, but a declaration supported by many prior decisions. Obviously it is the settled rule in the State.

These are all the matters called to our attention by counsel, and in them appearing no error, the judgment of the Supreme Court of Florida is

Affirmed.

Mr. Justice HARLAN did not hear the argument or take part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.